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PEOPLE OF THE STATE OF ILLINOIS, for the use of IDA SLAVIK, EMMA DIGUS, and BERTHA DIGUS, Conservatrices of LOUIS SCHERER, Incompetent, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
UNITED STATES FIDELITY AND GUARANTY COMPANY, and JOHN B. DIGUS, Appellees.	283 I.A. 627

Opinion filed Dec. 23, 1935

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

In a petition for a writ of mandamus, in aid of the Appellate Jurisdiction of this Court, filed by Emma Digus, one of the plaintiffs in the above entitled cause, she recites inter alia that in the trial of the cause, entitled People for use etc., v. Fidelity & Guaranty Co. No. 2758721, in the Municipal Court of Chicago, before the court and a jury, a verdict was entered against plaintiff, upon which judgment was entered on April 15th, 1935; that on the 13th day of July, 1935, plaintiffs filed their notice of appeal to the Appellate Court of Illinois, First District, with the clerk of the Municipal Court of Chicago; that on the 11th day of September, 1935, plaintiffs presented their report of proceedings at the trial to Charles McKinley, the judge before whom the cause was tried, for certification, and requested that the same be filed and made a part of the record in the cause on appeal; that upon the presentation of the said report of proceedings of the trial of said cause to the trial judge, this judge marked the same, "Presented this 11th day of September, 1935," and that he signed this notation; that thereupon this trial judge delivered such report of the proceedings to the counsel representing the defendants for examination by them; that while said report of proceedings was

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APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

283 I.A. 627

PEOPLE OF THE STATE OF ILLINOIS, for the use of IDA SILVIN, EMMA DIGUS, and BERTHA DIGUS, Conservators of LOUIS SCHERER, Incompetent,

Appellant,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, and JOHN R. DIGUS,

Appellees.

Opinion filed Dec. 23, 1935

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

In a petition for a writ of mandamus, in aid of the Appellate Jurisdiction of this Court, filed by Emma Digus, one of the plaintiffs in the above entitled cause, she recites inter alia that in the trial of the cause, entitled People for use etc., v. Fidelity & Guaranty Co. No. 272872, in the Municipal Court of Chicago, before the court and a jury, a verdict was entered against plaintiff, upon which judgment was entered on April 15th, 1935; that on the 15th day of July, 1935, plaintiffs filed their notice of appeal to the Appellate Court of Illinois, First District, with the clerk of the Municipal Court of Chicago; that on the 11th day of September, 1935, plaintiffs presented their report of proceedings at the trial to Charles McKinley, the judge before whom the cause was tried, for certification, and requested that the same be filed and made a part of the record in the cause on appeal; that upon the presentation of the said report of proceedings of the trial of said cause to the trial judge, this judge marked the same, "Presented this 11th day of September, 1935," and that he signed this notation; that thereupon this trial judge delivered such report of the proceedings to the counsel representing the defendants for examination by them; that while said report of proceedings was

pending settlement, defendants filed their motion in the Municipal Court of Chicago to dismiss the appeal on the ground that the report of the proceedings of the trial was not filed within sixty days after the notice of appeal; that on October 11th, 1935, plaintiffs filed in the Appellate Court for the First District of Illinois, a short record, together with a motion for an extension of time to file the complete record, briefs and abstracts, which motion was allowed, and that this court fixed the time for plaintiffs to file their complete record on November 15th, 1935, and the time in which to file briefs and abstracts on December 13th, 1935; that on October 21st, 1935, said Charles McKinley, the judge before whom the cause was tried in the Municipal Court of Chicago, upon said motion of defendants to dismiss the appeal, entered an order dismissing such appeal; that the presentation of the report of the proceedings of the trial in the Municipal Court was made within sixty days from the date of the filing in such court of plaintiff's notice of appeal; that the trial judge failed, neglected and refused to settle and sign and order filed the report of the proceedings of the trial, and has announced that the settling and signing and the order to file said report of the proceedings of the trial, will be held in abeyance.

In this petition for mandamus, the petitioner prays that a writ issue from this court, directed to said Charles McKinley, Judge of the Municipal Court, commanding him forthwith to expunge from the record in the cause in the Municipal Court of Chicago, the order entered October 21st, 1935, dismissing plaintiff's appeal to this court, and to settle, sign and order filed nunc pro tunc as of the 11th day of September, 1935, the date of the presentment of such report of proceedings at the trial, and that such further order may be entered in the premises as justice might require.

pending settlement, defendants filed their motion in the Municipal Court of Chicago to dismiss the appeal on the ground that the report of the proceedings of the trial was not filed within sixty days after the notice of appeal; that on October 11th, 1928, plaintiffs filed in the Appellate Court for the First District of Illinois, a short record, together with a motion for an extension of time to file the complete record, briefs and abstracts, which motion was allowed, and that this court fixed the time for plaintiffs to file their complete record on November 18th, 1928, and the time in which to file briefs and abstracts on December 12th, 1928; that on October 31st, 1928, said Charles McKinley, the judge before whom the cause was tried in the Municipal Court of Chicago, upon said motion of defendants to dismiss the appeal, entered an order dismissing such appeal; that the presentation of the report of the proceedings of the trial in the Municipal Court was made within sixty days from the date of the filing in such cause of plaintiff's notice of appeal; that the trial judge failed, neglected and refused to settle and sign and order filed the report of the proceedings of the trial, and has announced that the settling and signing and the order to file said report of the proceedings of the trial, will be held in abeyance.

In this petition for mandamus, the petitioner prays that a writ issue from this court, directed to said Charles McKinley, judge of the Municipal Court, commanding him forthwith to expunge from the record in the cause in the Municipal Court of Chicago, the order entered October 31st, 1928, dismissing plaintiff's appeal to this court, and to settle, sign and order filed nunc pro tunc as of the 11th day of September, 1928, the date of the presentment of such report of proceedings at the trial, and that such further order may be entered in the premises as justice might require.

To this petition an answer was filed by Charles McKinley, Judge of the Municipal Court of Chicago, the respondent in the cause, in which he recites inter alia that after the entry of the judgment in the cause, and the filing of the notice of appeal, the plaintiff presented to the respondent a document entitled, "Report of proceedings at the trial", and that the respondent endorsed thereon, as alleged in the petition, the words,"Presented this 11th day of September, 1935, Charles F. McKinley, Judge;" that upon the request of the attorneys for the defendant, he, the respondent, thereupon delivered this alleged report of proceedings to defendants' counsel; that on September 20th, 1935, defendants filed in the office of the clerk of the Municipal Court of Chicago, and presented to the court their motion to dismiss the appeal upon the ground that the report of proceedings at the trial had not been filed in the trial court within sixty days after the appeal had been perfected, together with their objections to such document, entitled "Report of Proceedings at the trial," in which they aver that the same was incorrect and incomplete, in that there was omitted from it entirely the testimony of certain witnesses, and that it showed the testimony of other witnesses in abstract form, that it omitted the defendants' cross-examination of certain of plaintiff's witnesses, that it omitted to include any exhibits offered in the trial, and to include any of the instructions given in the trial, and omitted to include any of the rulings on the trial which concerned the admission of testimony, and that respondent had not passed upon such objections. Respondent further alleges that the records of the office of the Clerk of the Municipal Court show that the notice of appeal in said cause in the Municipal Court was filed in the office of such clerk on July 12th, 1935. To the answer of respondent, petitioner filed a demurrer.

In this petition on behalf of the plaintiff by Mr.Alex Ebbinghaus, Judge of the Municipal Court of Chicago, the respondent in the house, is asked to restrain Lester Gill from either the entry of the judgment in the trial, and the filing of the action of appeal. The plaintiff's counsel to the respondent's demurrer contained, "Prayer of possession in the trial", and that the respondent contained therein, in filing in the petition, the words,"Protesting that Gill had of trespassers, 1924, Section 7, Chapter 7, Judgment that upon the record of the plaintiff for the defendant, so, the respondent, therefore defendant this claimed proper of respondent to petitioner' counsel that on September 20th, 1924, defendant filed in the office of the clerk of the Municipal Court of Chicago, the petition to the court their motion to dismiss the appeal upon the ground that his prayer of possession in the trial had not been filed in the trial court which step took after the appeal had been perfected, together with their petitions to work demurrer, entitled "Prayer of possession in the trial," in which they asserted that the case was improper and immaterial, in that there was another fact is entirely the testimony of certain witnesses, and that it showed the testimony of other witnesses in another form, that it appears the defendants' cross-examination of certain of plaintiff's witnesses, that it appeared to include any evidence offered in the trial, and to include any of the instructions given in the trial, and appeared to include any of the motions or the trial which concerned the admission of testimony, and that transcript had not passed upon such objections. Respondent further alleges that the records of the office of the clerk of the Municipal Court show that the motion of appeal is still pending in the Municipal Court and that the motion of such clerk on July 17th, 1924. In the matter of Ebbinghaus, petitioner filed a demurrer.

In People v. Holdom, 193 Ill. 319, a petition was presented to the Supreme Court of this state for a writ of mandamus to compel a judge of the Criminal Court of Cook County to sign and seal a certificate of evidence or bill of exceptions in a certain criminal case, in which the petitioner was a defendant, and who had been tried before this judge. The matter came before the Supreme Court for a hearing on a petition, answer and replication. The petitioner had been tried before the Criminal Court and convicted on a charge of robbery. Sixty days time was given in which to prepare and file his bill of exceptions. In the same month in which the judgment of conviction was entered, the petitioner presented to the trial judge what purported to be a bill of exceptions, and requested him to certify and seal the same. The trial judge inquired of the petitioner whether or not the bill, as presented to the court, had been exhibited to the state's attorney and approved by him, to which the petitioner replied that it had not been so presented. The court then directed the petitioner to present the bill of exceptions to the state's attorney for his approval, and stated that if the state's attorney did not object to the same, the court would sign and seal it. The court declined to examine or pass upon such bill of exceptions until it was "O.K'd" or approved by the state's attorney. The state's attorney refused to approve it. In his answer, the judge who tried the case, the respondent in the mandamus proceeding, stated that the bill of exceptions was not verified or sworn to by any person, that there was no official reporter present when the case was tried, and that he did not know personally, or remember, whether the matter set forth in the bill was correctly set forth. It appears from the opinion filed in the case that the petitioner in the cause was not a lawyer, and conducted his own defense. The court ordered the writ to issue, and said:

In Crouch v. Hallman, 190 Ill. 240, a petition was addressed to the Supreme Court of this state for a writ of mandamus to compel a judge of the criminal court of Cook County to sign and seal a certificate of evidence or bill of exceptions in a capital criminal case, in which the petitioner was a defendant, and who had been tried before this judge. The motion was taken the Supreme Court for a hearing on a petition, answer and replication. The petitioner had been tried before the criminal court and sentenced to a term of imprisonment. Briefly the case was given in which he alleged and filed his bill of exceptions. In the case needs to state the judgment of conviction was reversed. The petitioner presented to the trial judge what purported to be a bill of exceptions, and requested him to certify and seal the same. The trial judge informed of the petitioner whether or not the bill, as presented to the court, had been submitted to the district attorney and approved by him, to which the petitioner replied that it had not been so presented. The court then directed the petitioner to present the bill of exceptions to the district attorney for his approval, and stated that if the district attorney did not object to the same, the court would sign and seal it. The court continued to remain or pass upon such bill of exceptions until it was "A.K.P." as approved by the district attorney. The district attorney refused to approve it. In his answer, the judge the trial the case, the respondent to the mandamus proceeding, stated that the bill of exceptions was not written or sworn to by any person, that there was no affidavit another person when the case was tried, and that he did not know personally, or somehow, whether the matter set forth in the bill was actually set forth. It appears from the petition filed in the case that the petitioner is the person not but a lawyer, and conducted his own defense. The court ordered the writ to issue, and said:

"The petitioner was convicted of a grave offense and was entitled to the benefit of a record and a bill of exceptions, and to have his case passed upon by a court of appeals. This he could not have without the certificate of approval of respondent. We do not regard the reason assigned by respondent for his failure or refusal to make up, or cause to be made up, a properly certified bill of exceptions as sufficient. * * * The court was authorized to *** make such *** investigation and inquiry as would enable him to comply with his duty and give the petitioner such a bill of exceptions as would enable him to prosecute his writ of error. In People v. McDonnell, 155 Ill. 192, we held that where the court who had tried the case had died, his successor in office could be required to sign and approve a bill of exceptions, and in that case Mr. Justice Phillips, in speaking for the court, said (p.202): 'We have repeatedly held, and the citation of cases is unnecessary, that in settling a bill of exceptions by the trial judge he may resort to every legitimate means of ascertaining the correctness of the bill he is called upon to authenticate. He may not only have recourse to the stenographic report, but may send for the witnesses, and take such other steps and measures as will legitimately and properly advise him of the truth and of the correctness of the bill of exceptions which he signs.' And to the same effect is People v. Hughes, 172 Ill. 351. This respondent tried the case, and will doubtless, upon inspecting the record and reading the evidence tendered him, be able to sufficiently recall it to direct the proper preparation of the bill. People, ex rel. v. Williams, 31 Ill. 87."

We are of the opinion that the reasons given by respondent for not signing and sealing the report of the proceedings presented to him, were not sufficient to excuse him for not performing his duty in this regard.

The respondent also urges that because of the fact that the report of proceedings was not filed within a certain time, that the court was justified in dismissing the appeal. To this contention, we do not agree. It is not claimed, but that petitioner presented the report of the proceedings to the judge who tried the case in due time, and as was said by the Supreme Court in the Holdom case, it then became the duty of the trial judge to use all reasonable effort to determine what would be a correct report of the proceedings, and to then settle and sign the same. It was only because the court had not settled and signed the report of the proceedings that

"The preliminary and essential of a valid attorney and
was entitled to the benefit of a formal and a full hearing
proceedings, and to have his case tested upon by a sound
of evidence. This is doubt not have taken the practic-
ness of opinion at temperament. We do not impeach the
reasons assigned by respondent for his failure or refusal
to make up, or cause to be made up, a complete certified
bill of exceptions or pleadings. . . . The record was
substantial to her said work *** investigation and hearing
as would enable him to decide upon its duty and give the
petitioner such a bill of exceptions as would entitle him
to prosecute his writ of error. In fairness to respondent,
bill ill. 180, we note that there was error in the trial
the case had died, the petitioner is right; said he regained
he did not approve a bill of exceptions. But in that case
by. Further relation, is equally for the court, with
[illegible]. "In that proceedings said, and the relation of
there is necessarily. That in writing a bill of exceptions
by the trial judge to any result to which indicate some
of investigating the correctness of the bill, he is going
upon to substantiate. In our has only just relative to
the stenographic record, but our case for the attorney
and the case such other which and decisions is bill [illegible]
arity and requiring notice and of the [illegible] and of the
correctness of the bill of exceptions which is signed
and by the court affect in Jones v. Gunnels, 181 Ill. 180.
This respondent tried the case, and will therefore, upon
presenting the record and reading the evidence herein
his, be able to sufficiently result it to discuss the proper
preparation of the bill. People, ex rel. v. Williams,
81 Ill. 87."

We are of the opinion that the reasons given by respondent for not signing and sealing the report of the proceedings presented to him, were not sufficient to excuse him for not performing his duty in this regard.

The respondent also urges that because at the time that the report of proceedings was not filed within a certain time, that the court was justified in dismissing the appeal. To this contention, we do not agree. It is not claimed, but that petitioner tendered the report of the proceedings to the judge who tried the case in due time, and he was sick by the Supreme Court in the [illegible] case, it then became the duty of the trial judge to see all reasonable effort to determine what would be a correct report of the proceedings, and to then settle and sign the same. It was only because the court had not settled and signed the report of the proceedings that

petitioner did not herself cause it to be filed in the prescribed time.

It is ordered that the demurrer to the answer of respondent be sustained, that a writ of mandamus issue forthwith, directing Charles McKinley, Judge of the Municipal Court of Chicago, to forthwith expunge from the record in said cause in the Municipal Court of Chicago, the order entered October 21st, 1935, dismissing plaintiff's appeal, and further directing him to forthwith settle, sign and order filed nunc pro tunc as of September 11th, 1935, the report of the proceedings in case No. 2758721, entitled, People for use etc. v. U. S. Fidelity & Guaranty Co., in the Municipal Court of Chicago.

WRIT AWARDED

HEBEL, J, AND DENIS E. SULLIVAN, J. CONCUR.

37692

LILLIAN G. ARMSTRONG,
Plaintiff in Error,
v.
THE TRAVELERS INSURANCE COMPANY,
Defendant in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

283 I.A. 627

Opinion filed Dec. 27, 1935

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error, plaintiff seeks the reversal of a judgment against her for costs in the Superior Court of Cook County. The action is based upon certain insurance policies. The cause was submitted to a jury, which returned a verdict for the defendant.

The declaration which consists of a number of counts, charges generally that the husband of the plaintiff came to his death through accident, and that even though the decedent's death was caused by suicide, that the defendant is estopped to make such a defense. The theory of the defendant is that the insured committed suicide, and that by its terms, there can be no recovery under the policies for that reason. Plaintiff does not take issue with defendant that decedent was a suicide, except, as hereinafter stated. She claims that defendant is estopped from urging this defense.

The undisputed facts are that on the morning of Tuesday, April 29th, 1930, shortly before 7 o'clock, the insured was found dead in the garage of a summer home owned by the insured at Cross Lake, Wisconsin, which is not far from the Illinois-Wisconsin boundary line.

A man named Hughes, a witness produced by plaintiff, testified in substance that he knew the insured in his lifetime, that he had worked for him, in remodeling his house and the garage in question; that the garage had four large doors leading into it

37232

LUCILLE G. LAMBERSON,

Plaintiff in Error,

v.

THE PROTECTIVE INSURANCE COMPANY,

Defendant in Error.

Opinion filed Dec. 27, 1933

Mr. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT:

By this writ of error, plaintiff seeks the reversal of a judgment against her for costs in the Superior Court of Cook County. The action is based upon certain insurance policies. The cause was submitted to a jury, which returned a verdict for the defendant.

The declaration which consists of a number of counts, charges generally that the husband of the plaintiff came to his death through accident, and that even though the decedent's death was caused by suicide, that the defendant is estopped to make such a defense. The theory of the defendant is that the insured committed suicide, and that by its terms, there can be no recovery under the policies for that reason. Plaintiff does not take issue with defendant that decedent was a suicide, except, as hereinafter stated. She claims that defendant is estopped from urging this defense.

The undisputed facts are that on the morning of Tuesday, April 25th, 1930, shortly before 7 o'clock, the insured was found dead in the garage of a summer home owned by the insured at Green Lake, Wisconsin, which is not far from the Illinois-Wisconsin boundary line.

A man named Hughes, a witness produced by plaintiff, testified in substance that he knew the insured in his lifetime, that he had worked for him, in remodeling his house and the garage in question; that the garage had four large doors leading into it

from the street; that on the morning of April 29th, 1930, he, the witness, went to this garage for his tools, where he had been keeping them, that the locks on the service gate and the service door had been switched, that when he entered the garage, it was dark and the garage was filled with black smoke; that he opened the door to let the draft through, and that after he had done so, he found Mr. Armstrong, the decedent, in the automobile, and that the engine was running; that Armstrong was dead, and that his body was on the front seat of the automobile; that the witness telephoned for a doctor and waited until the coroner came; that he found the dededent's glasses on the front seat, broken on one side; that the engine of the car stopped running shortly thereafter because the tank was empty; that he knew the decedent, and that he was of a happy and genial disposition; that the insured's death occurred on Tuesday, and that the witness had seen him on the Sunday previous, and that he noted nothing out of the ordinary with him. On cross-examination, this witness testified that the doors through which the automobile entered the garage were locked; that the witness had to unhook them, and that the windows were closed; that the left door of the automobile was open; that the night before the witness had locked the garage. The testimony of this witness also is that prior to the time that he found the body of the decedent at 9 o'clock on the day mentioned, he had a telephone call from Mrs. Armstrong, plaintiff, at about 4 or 4:30 o'clock in the morning, in which she inquired about her husband.

George D. Lewis of Antioch, Illinois, also a carpenter, testified to the effect that he knew the decedent only by sight, and that he was with the witness Hughes when the body was found; that they went to the garage for tools; that Hughes opened the garage after first opening a gate; that they opened the service door and smoke came out; that Hughes went in and opened a large door, and

from the street; that on the morning of April 28th, 1920, he, the witness, went to this garage for his tools, where he had been keeping them, that the locks on the service gate and the service door had been switched, that when he entered the garage, it was dark and the garage was filled with black smoke; that he opened the door to let the draft through, and that after he had done so, he found Mr. Hawkins, the deceased, in the automobile, and that the engine was running; that Hawkins was dead, and that his body was on the front seat of the automobile; that the witness telephoned for a doctor and waited until the coroner came; that he found the deceased's glasses on the front seat, broken on one side; that the engine of the car stopped running shortly thereafter because the tank was empty; that he knew the deceased, and that he was of a happy and genial disposition; that the insured's death occurred on Tuesday, and that the witness had seen him on the Sunday previous, and that he noted nothing out of the ordinary with him. On cross-examination, this witness testified that the doors through which the automobile entered the garage were locked; that the witness had to unlock them, and that the windows were closed; that the left door of the automobile was open; that the night before the witness had locked the garage. The testimony of this witness also is that prior to the time that he found the body of the deceased at 9 o'clock on the day mentioned, he had a telephone call from Mrs. Hawkins, plaintiff, at about 4 or 4:30 o'clock in the morning, in which she inquired about her husband.

George E. Lewis of Antioch, Illinois, also a carpenter, testified to the effect that he knew the deceased only by sight, and that he was with the witness Hughes when the body was found; that they went to the garage for tools; that Hughes opened the garage after first opening a gate; that they opened the service door and smoke came out; that Hughes went in and opened a large door, and

that Armstrong was dead; that when he entered the garage, he could not see the automobile for the smoke, and that at that time, the engine was running; that everything in the garage was black and sooty, although it was daylight outside; that the tools of these carpenters were smudged with grease; that there were no lights burning in the garage; that the windows were closed and the doors were shut.

The plaintiff testified that she last saw her husband on the Monday morning before he died, his death occurring on Tuesday morning. There is no question but that the death of the decedent was caused by carbon monoxide gas, created by the running of the engine of the automobile.

Shirley E. Swanson, a daughter of the decedent, testified that she had an engagement to meet her father on Monday prior to his death for luncheon in Chicago; that she and her mother were at the appointed place, but that her father did not appear; that after making some inquiry in an effort to find out the whereabouts of her father, that they went home about 7 o'clock, and that her mother called up Antioch, and that she learned of her father's death the next morning.

The coroner of Kenosha County, Wisconsin, testified that he had not known the decedent before April 29th, 1930, when he received a call to go to Cross Lake, where he arrived about 8:25 A. M.; that he saw the witnesses Hughes and Lewis there; that the garage was locked when he arrived; that he saw the man lying back of the steering wheel, that his head was about two inches above the seat level on the right side of the car, his left hand in his lap, his right leg behind the clutch, and his left leg hanging out of the car on the running board; that there were indications that he died of carbon monoxide gas; that he and the sheriff opened the

that immediately was dead; that when he entered the garage, he could not see the automobile for the smoke, and that at that time, the engine was running; that everything in the garage was black and sooty, although it was daylight outside; that the tools of these carpenters were smudged with grease; that there were no lights burning in the garage; that the windows were closed and the doors were shut.

The plaintiff testified that she last saw her husband on the Monday morning before he died, his death occurring on Tuesday morning. There is no question but that the death of the decedent was caused by carbon monoxide gas, created by the running of the engine of the automobile.

Hilda E. Jensen, a daughter of the decedent, testified that she had an engagement in West Des Moines on Tuesday night to his death for luncheon in Chicago; that she and her mother were at the appointed place, but that her father did not appear; that after making some inquiry in an effort to find out the whereabouts of her father, that they went home about 7 o'clock, and that her mother called up Antioch, and that she learned of her father's death the next morning.

The coroner of Lucas County, Nebraska, testified that he had not known the decedent before April 28th, 1930, when he received a call to go to Cross Lake, where he arrived about 8:30 A. M.; that he saw the witnesses Hughes and Davis there; that the garage was locked when he arrived; that he saw the man lying back of the steering wheel, that his head was about two inches above the seat level on the right side of the car, his left hand in his lap, his right leg behind the clutch, and his left leg hanging out of the car on the running board; that there were indications that he died of carbon monoxide gas; that he and the sheriff opened the

doors at the rear of the car, and that he noticed the odor of soot in the garage; that at that time the engine was not running, but that the motor was warm and the gas tank was empty; that he found the decedent's hat on the floor of the car between the front and rear seat.

At the time of his death, Armstrong was an accountant for the Thomas Charles Company. He received a salary of $56.00 per week and a bonus of $25.00 each Christmas. William T. Dix, who was the treasurer and manager of the company by which Armstrong was employed, testified to the effect that on Saturday prior to decedent's death, he, the witness, had informed the decedent that the witness, had received a telegram, the substance of which was that the representative of an accounting firm who made an annual examination of the books of the Thomas Charles Company, would be present on the Monday morning following, to make an examination of the books of the company. It is also in evidence that on this Saturday prior to the death of decedent, Armstrong had informed an employee of the Thomas Charles Company by the name of Spires that the auditor was coming to Armstrong's office on the following Monday. The record discloses that for the five years prior to his death, Armstrong maintained an apartment, the rental of which was $1,500.00 per year; that the family kept a maid who was paid from $12.00 to $15.00 a week; that they kept two automobiles, upon which the garage storage charge was $180.00 per year; that he gave his wife $75.00 a month; that the daughter was for a portion of this time at school at Ferry Hall in Lake Forest at an expenditure of approximately $900.00 per year; that at the time of his death, there was an unpaid balance at Mandel's store for merchandise amounting to $1,828.65, the claim for which was allowed against the estate; that during the year 1929 other expenditures at this store were $883.00. Various other expenditures are shown to have been made by decedent and his family during

doors at the rear of the car, and that he noticed the odor of soot in the garage; that at that time the engine was not running, but that the motor was warm and the gas tank was empty; that he found the decedent's hat on the floor of the car between the front and rear seats.

At the time of his death, Armstrong was an accountant for the Thomas Starling Company. He received a salary of $60.00 per week and a bonus of $36.00 each Christmas. William T. Dix, who was the treasurer and manager of the company by which Armstrong was employed, testified to the effect that on October prior to decedent's death, he, the witness, had informed the decedent that the witness, had received a telegram, the substance of which was that the representative of an accounting firm who made an annual examination of the books of the Thomas Starling Company, would be present on the Monday morning following, to make an examination of the books of the company. It is also in evidence that on this Saturday prior to the death of decedent, Armstrong had informed an employee of the Thomas Starling Company by the name of Spires that the auditor was coming to Armstrong's office on the following Monday. The record discloses that for the five years prior to his death, Armstrong maintained an apartment, the rental of which was $1,800.00 per year; that the family kept a maid who was paid from $12.00 to $15.00 a week; that they kept two automobiles, upon which the garage storage charge was $180.00 per year; that he gave his wife $75.00 a month; that the daughter was for a portion of this time at school at Perry Hall in Lake Forest at an expenditure of approximately $[illegible].00 per year; that at the time of his death, there was an unpaid balance at Mandel's store for merchandise amounting to $1,[illegible].00, the claim for which was allowed against the estate; that during the year 1929 other expenditures at this store were $[illegible].00. Various other expenditures are shown to have been made by decedent and his family during

a few years prior to his death, and it is also shown that in addition to the apartment maintained in Chicago, decedent maintained this country home at which he died. It is shown that quite large expenditures were made in the purchase and repair of this country home, and that Armstrong had been paying premiums on $17,000.00 of life insurance for a considerable period prior to his death; that the family made trips to Florida, and it is established that the expenditures made by him were much in excess of the income shown to have been received by him. In the trial Mrs. Armstrong first testified that she had no separate income, and later testified that she had. The record indicates that the Thomas Charles Company by which the decedent was employed, was controlled by another corporation called the Milton Bradley Company. In the trial, counsel for defendant stated to the court that defendant had subpoenaed the Milton Bradley Company and the Thomas Charles Company to produce certain checks said to have been drawn by the decedent against the account of the Thomas Charles Company, and offered to prove by these checks that for a short period prior to Armstrong's death, Armstrong had drawn personal checks against the account of this company amounting to $56,000.00, and that an auditor was in the office of the employer of decedent on the Monday morning prior to decedent's death, checking these accounts. To this proof, counsel for the plaintiff objected, and the court sustained the objection. Other proof of like import was offered by the defendant, to which objection was made, and which objection was sustained by the court, and counsel for defendant suggests that the court erred in excluding this proof. While there may be much to counsel's contention, yet, in view of the fact that the verdict was in favor of the defendant, we do not deem it necessary to pass upon this question. The evidence does show that Armstrong had the right to and did draw checks upon the firm's account.

a few years prior to his death, and it is also shown that in addition to the apartment maintained in Chicago, expensive maintained this country home at which he died. It is shown that quite large expenditures were made in the purchase and repair of this country home, and that Armstrong had been paying premiums on $17,000.00 of life insurance for a considerable period prior to his death; that the family made trips to Florida, and it is established that the expenditures made by him were much in excess of his income as has been tendered by him. In the trial also, Armstrong first testified that she had no separate income, and later testified that she had. The record indicates that the Thomas Theatre Company by which the decedent was employed, was controlled by another corporation called the Milton Bradley Company. In the trial, counsel for defendant stated to the court that defendant and subpoenaed the Milton Bradley Company and the Thomas Theatre Company to produce certain checks said to have been given by the decedent against the account of the Thomas Theatre Company, and offered to prove by these checks that for a short period prior to Armstrong's death, Armstrong had drawn personal checks against the account of this company amounting to $22,000.00, and that an auditor was in the office of the employer of decedent on the Monday morning prior to decedent's death, checking these accounts. To this proof, counsel for the plaintiff objected, and the court sustained the objection. Other proof of life insurt was offered by the defendant, to which objection was made, and which objection was sustained by the court, and counsel for defendant suggests that the court erred in excluding this proof. While there may be much to counsel's contention, yet, in view of the fact that the verdict was in favor of the defendant, we do not deem it necessary to pass upon this question. The evidence does show that Armstrong had the right to and did draw checks upon the firm's account.

One Robert Ingersoll, employed by the Milton Bradley Company, testified to the effect that Lillian Armstrong "agreed in case she received compensation on the death of her husband - and there was any reason to reimburse the Milton Bradley Company, she would do it." This witness was asked whether the Milton Bradley Company had obtained, directly or indirectly for its benefit, a mortgage or other form of security from Lillian Armstrong for an indebtedness said to be owed by her husband to this concern. Objection was made to this question and sustained by the court.

The record indicates that after the audit of the books of the Thomas Charles Company by which Armstrong was employed, its assets were taken over by another company, and that it ceased to do business.

The record also indicates that subsequent to the death of the decedent on April 29th, 1930, plaintiff sent a check for the overdue premium on the policy sued upon to the defendant company, which was accepted. This premium had been paid to the defendant by its agent, through whom Armstrong obtained his insurance. It is insisted by the plaintiff that by the acceptance of this check, in spite of the fact that by the terms of the policy there could be no recovery in case of suicide, defendant is estopped from urging this defense. There is nothing in this contention. The jury was fairly instructed, and we cannot say that the verdict was contrary to the manifest weight of the evidence. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

One Robert Ingersoll, employed by the Milton Bradley Company, testified to the effect that William Armstrong "appeared in case she received compensation on the death of her husband - and there was any reason to reimburse the Milton Bradley Company, she would do it." This witness was asked whether the Milton Bradley Company had planned, directly or indirectly for its benefit, a mortgage or other loan of property from William Armstrong for an indebtedness said to be owed by her husband to this concern. Objection was made to this question and overruled by the court.

The record indicates that after the death of the husband the Thomas Dearing Company by which insurance was employed, its records were taken over by another company, but that it owned to do business.

The record also indicates that subsequent to the death of the defendant on April 20th, 1927, plaintiff sent a check for the premium payable on the policy sued upon to the defendant company, which was accepted. This premium had been paid to the defendant by its agent, through whom Armstrong obtained his insurance. It is insisted by the plaintiff that by the acceptance of this check, in spite of the fact that by the terms of the policy there could be no recovery in case of suicide, defendant is estopped from urging this defense. There is nothing in this contention. The jury was fairly instructed, and we cannot say that the verdict was contrary to the manifest weight of the evidence. Therefore, the judgment is affirmed.

AFFIRMED.

Bond, P. J. and Kirkpatrick, J., concur.

37814

MARGARET A. TREACY,

(Plaintiff) Appellee,

v.

FREEPORT MOTOR CASUALTY COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

283 I.A. 627[3]

Opinion filed Dec. 27, 1935

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago in an action brought by Margaret A. Treacy, plaintiff, against the Freeport Motor Casualty Company, a corporation. The statement of claim filed in the cause alleges, in substance, that on or about the 30th day of July, 1932, an insurance policy was issued and delivered by the defendant to the plaintiff covering a period commencing June 5th, 1932, and terminating on June 5th, 1933, in consideration of a premium of $52.10, and that the plaintiff paid the defendant such premiums as follows: On August 6th, 1932, the sum of $26.05, on September 24th, 1932, the sum of $5.42, on October 22nd, 1932, the sum of $3.00, on November 11th, 1932, the sum of $2.00, and on January 13th, 1933, the sum of $15.63, a total of $52.10. It is further alleged that the defendant had agreed to extend the time of payment of the premium due on the 1st of December, 1932, which was paid January 13th, 1933; that the plaintiff was the owner of a Chevrolet automobile and that same was of the value of $450.00; that the automobile was stolen on December 20th, 1932, and that the damage to the plaintiff was the sum of $450.00; that the plaintiff notified the defendant of the theft of the automobile immediately after it was stolen; that on February 15th, 1933, plaintiff rendered a sworn statement to the defendant as to the time, place, etc., of the loss of the automobile, and that on February 17th, 1933, defendant

37214

MARGARET A. THEACY, (Plaintiff) Appellee, v. MARGARET ALICE MARGARET CORBAT, a corporation, (Defendant) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Dec. 27, 1935

MR. PRESIDING JUSTICE MATT. SCHLAEGEL THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago in an action brought by Margaret A. Theacy, plaintiff, against the Freeport Motor Casualty Company, a corporation. The statement of claim filed in the court alleges, in substance, that on or about the 30th day of July, 1932, an insurance policy was issued and delivered by the defendant to the plaintiff covering a period commencing from 8th, 1932, and terminating on June 8th, 1933, in consideration of a premium of $16.12, and that the plaintiff paid the defendant such premium as follows: On August 8th, 1932, the sum of $3.02, on September 24th, 1932, the sum of $2.42, on October 22nd, 1932, the sum of $3.02, on November 11th, 1932, the sum of $2.00, and on January 13th, 1933, the sum of $3.66, a total of $12.12. It is further alleged that the defendant had agreed to extend the time of payment of the premium due on the 1st of December, 1932, which was paid January 13th, 1933; that the plaintiff was the owner of a Chevrolet automobile and that same was of the value of $450.00; that the automobile was stolen on December 20th, 1932, and that the damage to the plaintiff was the sum of $450.00; that the plaintiff notified the defendant of the theft of the automobile immediately after it was stolen; that on February 13th, 1933, plaintiff tendered a sworn statement to the defendant as to the time, place, etc., of the loss of the automobile, and that on February 17th, 1933, defendant

notified the plaintiff that it would not pay the claim by reason of the fact that the insurance policy was not in force and effect at the time of the alleged theft.

The defendant filed an affidavit of merits admitting the issuance of the policy, but denying that it was indebted to the plaintiff, as alleged in the statement of claim, because of the fact that the plaintiff had allowed her policy to be and remain in default for failure to pay the premium due on the 1st day of December, 1932, and up to the time that the automobile was stolen on the 20th day of December, 1932, and that the plaintiff is bound by the terms of the rider attached to the policy, which said rider is as follows:

> "The term of this policy shall begin at noon on the 5th day of June, 1932, and shall end at noon on the 5th day of Dec., 1932, Standard time, at the address of the Assured named in the policy to which this endorsement is attached, provided, the second and third installments of premium are paid on the dates due, and, that the policy will be continued in force for the next ensuing period of six months to noon on the 5th day of June, 1933, upon payment by the Assured of the fourth or final payment of premium on or before the date of payment as set forth below.
>
> It is understood and agreed that the premium is to be paid as follows:
>
> First Payment, due with application $15.63
> Second Payment, due July 5, 1932 . . . . . 10.42
> Third Payment, due Sept. 5, 1932 . . . . . 10.42
> Fourth Payment, due Dec. 5. 1932 . . . . . 15.63
>
> All payments of the premium, except the first, must be made at the Home Office of the Company on or before the date due to keep this Policy continuously in force. Any payment of premium falling due on a Sunday or Holiday must be paid on or before the preceding day.
>
> It is understood and agreed, notwithstanding anything in the policy to the contrary, that the Company shall not be liable under this Policy during any period in which the Assured may be in default for the payment of any part of the premium. On payment of any premium past due for reinstatement of the policy, the term thereof shall not be extended, nor deduction made for the lapped period. Such premium shall be due the Company as consideration for reinstating the Policy.
>
> It is further understood and agreed that if the policy is terminated on account of default of any payments of the premium due as set forth above, the Company shall be entitled

notified the plaintiff that it would not pay the claim by reason of the fact that the insurance policy was not in force and effect at the time of the alleged theft.

The defendant filed an affidavit of merits admitting the issuance of the policy, but denying that it was indebted to the plaintiff, as alleged in the statement of claim, because of the fact that the plaintiff had allowed her policy to be and remain in default for failure to pay the premium due on the last day of December, 1929, and up to the time that the automobile was stolen on the 30th day of December, 1929, and that the plaintiff is bound by the terms of the rider attached to the policy, which said rider is as follows:

"The term of this policy shall begin at noon on the 4th day of June, 1929, and shall end at noon on the 4th day of Dec., 1929, Standard Time, at the address of the insured named in the policy in which this endorsement is attached, provided, the renewal and total installments of premiums are paid on the dates due, and the policy will be continued in force for the next ensuing period of six months in manner as the day of June, 1929, upon payment by the insured of the month or total premium on or before the date of payment as set forth below:

It is understood and agreed that the premium is to be paid as follows:

First Payment, due with application	$18.62
Second Payment, due July 5, 1929	18.62
Third Payment, due Sept. 5, 1929	18.62
Fourth Payment, due Dec. 5, 1929	18.62

All payments of the premium, except the first, must be made at the home office of the Company on or before the date fixed in this Policy continuously in force. Any payment of premium falling due on a Sunday or Holiday must be paid on or before the preceding day.

It is mutually and agreed, notwithstanding anything in the policy to the contrary, that the Company shall not be liable under this Policy during any period in which the insured may be in default for the payment of any part of the premium. On payment of any premium past due for reinstatement of the policy, the term thereof shall not be extended, nor deduction made for the lapsed period. Such premium shall be due the Company as consideration for reinstating the Policy.

It is further understood and agreed that if the policy is terminated on account of default of any payments of the premium due as set forth above, the Company shall be entitled

to the customary short rate premium for the expired term.
Attached to and forming a part of Policy No. 74621 of the Freeport Motor Casualty Company of Freeport, Illinois."

The policy referred to, with the rider, was introduced in evidence by the plaintiff.

Plaintiff admits that the last premium to be paid on the policy in question was not paid until after the automobile was stolen, but insists that because of plaintiff's course of dealing with the defendant corporation, through one Reichmann, its agent, that the company had waived its right to forfeit the contract because of the nonpayment of this premium. It is shown that various other installments of the premiums due had been received and credited to the plaintiff on her policy after they were due and payable, and after she had received notice that her policy would lapse, unless they were paid when due.

The plaintiff testified in substance that on the 16th day of December, 1932, and after she had received notice that there had been a default in the last payment on her insurance premium, as agreed to be made, she had a telephone conversation with Reichmann, the agent of the company, who had sold her the insurance policy; that at that time there was fifteen dollars and some cents due as a balance on this policy for the rest of the term, and that plaintiff told Reichmann she was not in a position at that time to pay the balance, but that she would be able to pay it after the first of the year; that Reichmann offered to pay the balance of the insurance premium himself, and that she told Reichmann that it would not be fair for him to so use his money at that time. We find nothing in this conversation which indicates any promise on the part of Reichmann to extend the time of payment beyond the date fixed in the policy, even though he had the power to do so, which is not

in the monthly short rate premium for the elapsed time.

attached is and forming a part of policy No. 78015 of the Freeport Motor Casualty Company of Freeport, Illinois."

The policy referred to, with the rider, was introduced in evidence by the plaintiff.

Plaintiff admits that the last premium to be paid on the policy in question was not paid until after the automobile was stolen, but insists that because of plaintiff's course of dealing with the defendant corporation, through one Heinemann, its agent, that the company had waived its right to forfeit the contract because of the nonpayment of this premium. It is shown that various other installments of the premiums due had been received and credited to the plaintiff on her policy after they were due and payable, and after she had received notice that her policy would lapse, unless they were paid when due.

The plaintiff testified in substance that on the 16th day of December, 1922, and after she had received notice that there had been a default in the last payment on her insurance premium, as agreed to be made, she had a telephone conversation with Heinemann, the agent of the company, who had sold her the insurance policy; that at that time there was fifteen dollars and some cents due as a balance on this policy for the rest of the term, and that plaintiff told Heinemann she was not in a position at that time to pay the balance, but that she would be able to pay it after the first of the year; that Heinemann offered to pay the balance of the insurance premium himself, and that she told Heinemann that it would not be fair for him to do use his money at that time. We find nothing in this conversation which indicates any promise on the part of Heinemann to extend the time of payment beyond the date fixed in the policy, even though he had the power to do so, which is not

shown. The last installment of the premium paid after the automobile was stolen, was received by defendant, but later returned to the plaintiff. The cause was tried before a jury, and at the close of the plaintiff's case, and after all the evidence was submitted, motions were made by defendant to direct the jury to return a verdict for the defendant, both of which motions were denied.

In view of the patent fact that plaintiff was in default in the payment of her premium at the time the automobile was stolen, and that by the terms of the policy, it was therefore, not in force at that time, the court was in error in not directing a verdict for defendant. Therefore, the judgment is reversed, and it is ordered that judgment be entered here for defendant.

REVERSED AND JUDGMENT ENTERED HERE.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

auxm. The last installment of the premium paid after the automobile was stolen, was received by defendant, but later returned to the plaintiff. The cause was tried before a jury, and at the close of the plaintiff's case, and after all the evidence was submitted, motions were made by defendant to direct the jury to return a verdict for the defendant, both of which motions were denied.

In view of the proofs that this plaintiff was in the-
fact in the payment of her premium at the time the automobile
was stolen, and that by the terms of the policy, it was therefore,
not in force at this time, the court was in error in not directing
a verdict for defendant. Therefore, the judgment is reversed, and
it is ordered that judgment be entered here for defendant.

REVERSED AND JUDGMENT ENTERED HERE.

Mason, C. J. and Smith, Hallett, J. concur.

37993

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
WILLIAM DAVIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

283 I.A. 628[1]

Opinion filed Dec. 27, 1935

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On October 13th, 1933, two informations were filed in the Municipal Court of Chicago, charging that the defendant, William Davis, had contributed to the delinquency of two children on September 20th, 1933. One of these informations, named Marion Lillian Mason, sixteen years of age, as the injured person, and the other information named Dorothy Beasley, seventeen years of age, as the injured person. Although the hearings on the informations were continued ten times, trials of the same were had on February 28th, 1934.

While these informations were pending and undisposed of in the Municipal Court of Chicago, on November 17th, 1933, the grand jury of Cook County returned an indictment, charging that on September 20th, 1933, the same date mentioned in the informations filed, this said William Davis did entice and take away one Marion Lillian Mason, who was then and there an unmarried female person of chaste life and conversation, from the house of her parents in said county, for the purpose of concubinage and prostitution. The trial of the cause was had on January 30, 1934, in the Criminal Court of Cook County, and the defendant Davis was found guilty of the crime,as charged.

On February 28th, 1934, when the two causes were called for trial, the defendant pleaded guilty to the charges made in each of such informations, and the defendant was sentenced to serve one year in the House of Correction for each offense, the sentence of

27202

THE PEOPLE OF THE STATE OF ILLINOIS,) ERROR TO
)
Defendant in Error,)
)
v.)
)
WILLIAM DAVIS,) Of Criminal.
)
Plaintiff in Error.)

Opinion filed Dec. 27, 1932

Mr. PRESIDING JUSTICE WILL delivered the opinion of the court:

On October 12th, 1932, two informations were filed in the Municipal Court of Chicago, charging one Catherine, William Davis, had contributed to the delinquency of two children on September 20th, 1932. One of these informations, named Marian Lillian Mason, sixteen years of age, as the injured person, and the other information also charged contributing delinquency of age, as the injured person. Although the charges in the informations were continued ten times, trials of the same were had on February 28th, 1934.

While these informations were pending and undisposed of in the Municipal Court of Chicago, on November 17th, 1932, the grand jury of Cook County returned an indictment, charging that on September 20th, 1932, the same date mentioned in the informations filed, this said William Davis did entice and take away one Marian Lillian Mason, who was then and there an unmarried female person of chaste life and conversation, from the house of her parents in said county, for the purpose of concubinage and prostitution. The trial of the cause was had on January 22, 1934, in the Criminal Court of Cook County, and the defendant Davis was found guilty of the crime as charged.

On January 22nd, 1934, upon the two counts were called for trial, the defendant pleaded guilty to the charges made in each of such informations, and the defendant was sentenced to serve one year in the House of Correction for each offense, the sentence of

the court on each information as it reads, to run concurrently.

On September 25th, 1934, the defendant filed in the Municipal Court of Chicago his petition in the nature of a writ of error coram nobis, under Section 21 of the Municipal Court Act and Section 89 of the Practice Act, seeking to set aside the findings, judgments, sentences and commitments, and order a new trial in each case. It is sought to review both cases by the writ of error issued from this court. Separate records have been filed here, the record in the matter of the information as to Marion Lillian Mason being numbered here as 37992, and the information as to Dorothy Beasley being numbered here as 37993. While there has been no order of consolidation entered in the case, in view of the fact that but one petition was filed in the Municipal Court for the review of the judgments of conviction against the defendant Davis, the cases have been considered here together, and the opinion in this court, and the reasons therein stated in case No. 37992, will govern here and for the reasons stated in case No. 37992, the judgment of the Municipal Court, finding defendant guilty of the charge involving Dorothy Beasley, Case No. 1,257,699 in such Municipal Court, is affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

the court on such information as it deems, to run concurrently.

On September 28th, 1954, the defendant filed in the municipal Court of Chicago his petition in the nature of a writ of error coram nobis, under Section 81 of the Municipal Court Act and section 65 of the Practice Act, seeking to set aside the findings, judgments, sentences and commitments, and order a new trial in each case. It is sought to vacate such cases by the writ of error issued from this court. Separate records have been filed here, the second in the matter of the determination as to section 116116 from being numbered here as 37555, and the information as to Dorothy Beasley being numbered here as 37556. While there has been no order of consolidation entered in the court, in view of the fact that one petition was filed in the Municipal Court for the review of the judgments of conviction against the defendant Davis, the cases have been considered here together, and the opinion in this court, and the reasons therein stated in case No. 37555, will govern here and for the reasons stated in case No. 37556, the judgment of the Municipal Court, finding defendant guilty of the charge involving Dorothy Beasley, Case No. 1,327,578 in such Municipal Court, is affirmed.

AFFIRMED.

KERR, J., AND DAVIS J. CONCURRING, J. CONCURS.

38119

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
PETER J. NORICH, Jr.,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

283 I.A. 628

Opinion filed Dec. 27, 1935

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago, whereby a fine of $1.00 and a sentence of a term of six months in the House of Correction was imposed upon the defendant on a charge of obtaining money by false pretenses. The trial was before the court without a jury, and the court found the defendant guilty of the crime, as charged.

The undisputed evidence adduced at the trial is to the effect that on the 3rd day of February, 1933, there was issued to defendant, what was termed, "Valued Form Automobile Insurance Contract Subscribers at The Inter-Insurance Exchange of The Chicago Motor Club Herein Called The Exchange," by which it was agreed, among other things, that the defendant should, be paid the "actual loss of, or damage to, any automobile described herein, including its operating equipment, which attached thereto, and caused solely by theft, robbery or pilferage;" that thereafter on August 9th, 1933, "The Inter-Insurance Exchange of the Chicago Motor Club" received a report from the defendant that the car covered by the policy had been stolen; that on October 5th, 1934, a check for $325.00 was issued to the order of Joseph J. Merensky, attorney for the defendant by "The Inter-Insurance Exchange of the Chicago Motor Club," and that the check was endorsed by Joseph J. Merensky, and paid. A man named McCormack, manager of the theft department of the Chicago Motor Club,

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

FRED J. MORGAN, Jr.,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 27, 1935

MR. PRESIDING JUSTICE WILL DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Municipal Court of Chicago, whereby a fine of $1,00 and a sentence of a term of six months in the House of Correction was imposed upon the defendant on a charge of obtaining money by false pretenses. The trial was before the court without a jury, and the court found the defendant guilty of the crime, as charged.

The undisputed evidence adduced at the trial is to the effect that on the 3rd day of February, 1933, there was issued to defendant, what was termed, "Valued Form Automobile Insurance Contract Subscribers at The Inter-Insurance Exchange of The Chicago Motor Club Herein Called The Exchange," by which it was agreed, among other things, that the defendant should, be paid the "actual loss of, or damage to, any automobile described herein, including its operating equipment, which attached thereto, and caused solely by theft, robbery or pilferage;" that thereafter on August 8th, 1933, "The Inter-Insurance Exchange of the Chicago Motor Club" received a report from the defendant that the car covered by the policy had been stolen; that on October 8th, 1934, a check for $325.00 was issued to the order of Joseph L. Meronsky, attorney for the defendant by "The Inter-Insurance Exchange of the Chicago Motor Club," and that the check was endorsed by Joseph L. Meronsky, and paid. A man named McCormack, manager of the theft department of the Chicago Motor Club,

testified that on October 3rd, 1933, he learned that the claim was fraudulent. On November 1st, 1934, an information was filed in the Municipal Court of Chicago, sworn to by one Frank L. Krueger, by which it is alleged inter alia that the defendant on the 17th day of August, 1933, at the city of Chicago, knowingly, fraudulently, designedly, unlawfully and falsely pretended to the "Inter-Insurance Exchange of the Chicago Motor Club and Association" that his Buick automobile had been stolen from the "inter-section of Adams and Laflin St." on or about the 9th day of August, 1933; that the statement of the defendant that his automobile was stolen was untrue, and that he obtained the check referred to, the property of the "Inter-Insurance Exchange of the Chicago Motor Club" by false pretenses.

When the case was called for trial, defendant, through his attorney, moved to quash the information because of the fact that the venue in the information was not properly laid by the charge that the automobile in question was reported stolen from the "intersection of Adams & Laflin St." Thereupon, the court allowed the state's attorney to amend the information on its face by interlining the words "Chicago, Illinois" after the words "Adams & Laflin St." It is insisted that the information should have been reverified after the amendment was made, and the case of People v. Duyvejonck, 337 Ill. 636, is cited as authority. In that case, the information was made on "information and belief", which expression the court allowed to be stricken from the information, as filed, by drawing a line through these words, and the Supreme Court held that such method of amending the information was not proper. In the present case, however, the gist of the charge is that "at the city of Chicago" de fendant obtained money from the insurance company by falsely representing that his automobile was stolen, when, as a matter of fact, this was untrue. Whether the automobile was

testified that on October 2nd, 1933, he learned that the claim was fraudulent. On November 1st, 1934, an information was filed in the Municipal Court of Chicago, sworn to by one Frank L. Kemper, by which it is alleged inter alia that the defendant on the 17th day of August, 1932, at the city of Chicago, knowingly, fraudulently, designedly, unlawfully and falsely pretended to the "Inter-Insurance Exchange of the Chicago Motor Club and Association" that his Ford automobile had been stolen from the "Inter-Section of Adams and Laflin St." on or about the 8th day of August, 1932; that the assurement of the defendant that his automobile was stolen was untrue, and that he received the sum of $[illegible] by the property of the "Inter-Insurance Exchange of the Chicago Motor Club" by false pretences.

When the case was called for trial, defendant, through his attorney, moved to quash the information because of the fact that the venue in the information was not properly laid by the charge that the automobile in question was reported stolen from the "intersection of Adams & Laflin St." Thereupon, the court allowed the state's attorney to amend the information on its face by interlining the words "Chicago, Illinois" after the words "Adams & Laflin St." It is insisted that the information should have been quashed after the amendment was made, and the case of People v. Duvelopek, 327 Ill. 256, is cited as authority. In that case, the information was made on "information and belief", which averred the court allowed to be stolen from the defendant, as filed, by leaving a line through that word, and the Supreme Court held that such method of amending the information was not proper. In the present case, however, the gist of the charge is that "at the city of Chicago" defendant obtained money from the insurance company by falsely representing that his automobile was stolen, when, as a matter of fact, this was untrue. Whether the automobile was

reported stolen from some place in Chicago, or in a foreign state, would not affect the question of venue when the charge is made that the crime for which defendant was convicted, was committed in Chicago. The court will take judicial notice of the fact that Chicago is in Cook County.

As noted, the charge in the information is that the defendant by false pretenses obtained the check in question from the "Inter-Insurance Exchange of the Chicago Motor Club Association," the same being the property of such association, and the proof is that the check was issued by the "Inter-Insurance Exchange of the Chicago Motor Club". There is no averment in the information that either the issuer of the check, nor the institution from which the check was obtained by the alleged false pretenses, is a person or entity that could own property under either of the titles mentioned, and there was no proof offered or received on this question.

In People v. Cohen, 352 Ill. 380, M. Cohen and Frank Nelson were indicted in the Criminal Court of Cook County on a charge of larceny and receiving stolen property, knowing the same to have been stolen, and that such property was the "personal goods and property of the Pullman Company, a corporation." In its opinion, the Supreme Court said, among other things, that "there is no evidence whatever that tended to prove that the Pullman Company was a corporation. The proof in the record is that the owner of the property in question was the Pullman Company. There was no proof of user of corporate powers and franchises, and there was no proof of any kind or any statement by any witness that the Pullman Company was, in fact, a corporation. In view of the foregoing facts, it will not be necessary for this court to make any further statement of the evidence". Further, in its opinion, the court said:

reported stolen from some place in Chicago, or in a foreign state, would not affect the question of venue when the charge is made that the crime for which defendant was convicted, was committed in Chicago. The court will take judicial notice of the fact that Chicago is in Cook County.

In Moten, the charge in the information is that the defendant by false pretenses obtained the check in question from the "Inter-Insurance Exchange of the Chicago Motor Club Association," the same being the property of such association, and the proof is that the check was issued by the "Inter-Insurance Exchange of the Chicago Motor Club". There is no evidence in the information that either the issuer of the check, nor the institution from which the check was obtained by the alleged false pretenses, is a person or entity that could own property under either of the titles mentioned, and there was no proof offered or received on this question.

In People v. Cohen, 328 Ill. 320, M. Cohen and Frank Kalina were indicted in the Criminal Court of Cook County on a charge of larceny and receiving stolen property, knowing the same to have been stolen, and that such property was the "personal goods and property of the Pullman Company, a corporation." In its opinion, the Supreme Court said, among other things, that "there is no evidence whatever that tended to prove that the Pullman Company was a corporation. The proof in the record is that the owner of the property in question was the Pullman Company. There was no proof of user of corporate powers and franchises, and there was no proof of any kind or any statement by any witness that the Pullman Company was, in fact, a corporation. In view of the foregoing facts, it will not be necessary for this court to make any further statement of the evidence". Further, in its opinion, the court said:

"It has been the settled law of this State since this court was first organized, that every material allegation in an indictment for a felony must be proved beyond a reasonable doubt before a defendant charged with such a crime can be legally convicted for the same. One of the material allegations of the indictment in this case is that the Pullman Company, the owner of the property alleged to have been stolen, was a corporation. This court has so held in an unbroken line of cases from its first organization and has never to this date held otherwise in any case of which we are aware. We so held in People v. Struble, 275 Ill. 162, People v. Krittenbrink, 269 id. 244, and Aldrich v. People, 225 id. 610. In determining the sufficiency of indictments the court must abide by long established and well known rules of law, and parties engaged in drawing indictments and in trying criminal cases should give reasonable attention to the law governing the drawing of indictments and as to the necessary proof to be made in the trial of criminal cases. Under our law the ownership of property embezzled or stolen must be alleged with the same accuracy as is required at common law unless the rule is modified by statute. An averment in an indictment that the property embezzled, stolen or concealed was the property of the 'American Express Company, an association,' without alleging incorporation or such facts as would show that such company could own property by that name, will not sustain a conviction under our law. (People v. Brander, 244 Ill. 26.) In such a case there should be an allegation that the association is such a person or entity that it could own property under that name, or the individuals of such association who did own the property should be set forth as the owners of the property."

Upon the authority of this case, and the cases there cited, we conclude that the information was entirely insufficient in its allegation as to the character of the institution from which the check is alleged to have been obtained, and that the proof was insufficient to sustain the finding of the court for the reason that there was a failure to show that the named institution was authorized to hold and own property. For the reasons stated, the judgment is reversed.

REVERSED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

Upon the authority of this case, and the cases there cited, we conclude that the information was validly insufficient as to its allegations as to the character of the institution from which the check is alleged to have been obtained, and that the proof was insufficient to sustain the finding of the court for the reason that there was a failure to show that the named institution was authorized to hold and own property. For the reasons stated, the judgment is reversed.

REVERSED.

KENNA, J., (AS MAYOR T. SULLIVAN), J., CONCUR.

37888

NERSES BEDROSIAN,

(Plaintiff) Appellee,

v.

HERMAN SCHOENSTADT & HENRY SCHOENSTADT, doing business as PICCADILLY HOTEL,

(Defendants) Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

283 I.A. 628

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment entered in the Municipal Court of Chicago for $900 upon the verdict of the jury, which was recovered by the plaintiff in an action for the loss of plaintiff's Dodge Sedan and certain personal property contained therein owned by the plaintiff.

Plaintiff's statement of claim alleges, in substance, that the plaintiff was the owner of a 1932 Dodge sedan; that he became a guest of the Piccadilly Hotel, which was operated by the defendants, and upon an oral agreement was to pay $8.00 per day for the rooms occupied by him, and the defendants orally agreed to remove all plaintiff's personal effects from the automobile and deliver the same to plaintiff's room, and keep plaintiff's automobile safe in a garage.

The defendants denied the material allegations of the statement of claim, and upon this state of the record the case was submitted to a jury and judgment entered.

It appears from the evidence that the plaintiff was the owner of the Dodge sedan, which he purchased for $1,115, and that there were personal effects and belongings in the car of the value of approximately $190, which were lost; that when he rented the rooms in the Piccadilly Hotel, Chicago, which was operated by the defendants, he inquired about the safety of his car and was assured by the agent of the hotel that it had its own garage, and

Opinion filed Dec. 27, 1935

Mr. justice Scott delivered the opinion of the court.

This is an appeal by the defendants from a judgment entered in the Municipal Court of Chicago for $500 upon the verdict of the jury, which was rendered by the plaintiff in an action for the loss of plaintiff's Dodge sedan and certain personal property contained therein stored by the plaintiff.

Plaintiff's statement of claim alleges, in substance, that the plaintiff was the owner of a 1932 Dodge sedan; that he became a guest of the Friendship Hotel, which was operated by the defendants, and upon an oral agreement was to pay $2.00 per day for the room occupied by him, and the defendants orally agreed to remove all plaintiff's personal effects from the automobile and deliver the same to plaintiff's room, and keep plaintiff's automobile safe in a garage.

The defendants denied the material allegations of the statement of claim, and upon this state of the record the case was submitted to a jury and judgment entered.

It appears from the evidence that the plaintiff was the owner of the Dodge sedan, which he purchased for $1,115, and that there were personal effects and belongings in the car of the value of approximately $150, which were lost; that when he rented the rooms in the Friendship Hotel, Chicago, which was operated by the defendants, he inquired about the safety of his car and was assured by the agent of the hotel that it had its own garage, and

that the doorman would take it to the garage and bring it back the next morning; that he then delivered the keys to the car to the clerk; and that he remembers having received a garage ticket; that he again inquired as to the safety of the articles in the car and was assured that everything was safe.

It further appears from the evidence that on the following morning, July 5, 1933, Mr. Schoenstadt, one of the defendants, called the plaintiff to his office and advised him that his car had been stolen; that it was wrecked, and that the hotel would "make it good"; that the garage had insurance and the hotel had insurance, and that the parties were all responsible; that the plaintiff told the defendants that he also carried insurance, and the car was in perfect condition before the accident. The plaintiff, accompanied by Mr. Schoenstadt, one of the defendants, and the attorney for the hotel, reported the loss to the police station, and the police sergeant made out papers, which the plaintiff signed. It further appears from the evidence that on the 6th, 7th, 8th and 10th of July, he, the plaintiff and other gentlemen, including the attorney for the defendants, discussed the amount of his loss and the settlement thereof; that his car was not returned to him, but could be repaired at a cost of approximately $500, but when repaired the car would not be in as good condition as it was before the accident; that plaintiff received $100 for the wrecked car; that on July 4, 1933, the total loss of the plaintiff amounted to $1,000, which included several items of personal property in the car at the time of the accident.

The defendants offered the evidence of the doorman of the hotel, whose name was Jake Branch. He testified to the effect that the plaintiff did not say anything to him about the car when he drove up in front of the hotel; that he did ask about a garage

that the doorman would take it to the garage and bring it back the next morning; that he then delivered the keys to the car to the clerk; and that he remembers having received a garage ticket; that he again inquired as to the safety of the utilities in the car and was assured that everything was safe.

It further appears from the evidence that on the following morning, July 8, 1922, Mr. Schneeweist, one of the defendants, called the plaintiff to his office and advised him that his car had been stolen; that it was wrecked, and that the insurance would "make it right"; that the garage had insurance and his hotel had insurance, and that the parties were all responsible; that the plaintiff told the defendants that he also carried insurance, and the car was in perfect condition before the accident. The plaintiff, accompanied by Mr. Schneeweist, one of the defendants, and the attorney for the hotel, reported the loss to the police station, and the police sergeant made out papers, which the plaintiff signed. It further appears from the evidence that on the 11th, 12th and 13th of July, he, the plaintiff and other witnesses, including the attorney for the defendants, discussed the amount of his loss and the settlement thereof; that his pay was not returned to him, but would be required at a cost of approximately $200, but when repairing the car would not be in as good condition as it was before the accident; that plaintiff received $100 for the wrecked car; that on July 4, 1922, the total loss of the plaintiff amounted to $1,000, which included several items of personal property in the car at the time of the accident.

The defendants offered the evidence of the manager of the hotel, whose name was Jake Brown. He testified to the effect that the plaintiff did not say anything to him about the car when he drove up in front of the hotel; that he did ask about a garage

and was informed that there were garages in the neighborhood, and that at plaintiff's request this witness called a garage and was told to give plaintiff a garage ticket; that plaintiff went to his rooms and about 11 o'clock p.m. came down again to ask about his car; that he tipped the witness and requested the witness to take his car into the garage at 12:00 p.m., at which time the witness would have finished with his work; that the witness, after 12 p.m. changed his clothes and took the car out on a joy ride, and that the car was hit by a truck and wrecked.

Other witnesses testified as to the value of the automobile, and the hotel clerk testified that he did not receive the keys to the car from the plaintiff, nor did he tell the plaintiff that the hotel would take care of his car in a garage of its own.

It is apparent from this record that the evidence was for the jury to pass upon, and under the instructions of the court determine the veracity of the witnesses, the weight of the evidence, and whether or not the plaintiff had established his case by a preponderance of the evidence. The question is largely one of fact and we must determine whether the verdict of the jury and the judgment entered thereon was manifestly against the weight of the evidence. While the evidence is disputed, we cannot from this record conclude that the jury was not justified in returning the verdict which it did.

The defendants contend that evidence showing the parties carried insurance policies covering the property involved in this case tended to prejudice the jury, and was error notwithstanding the court's instructions to the jury that the fact that insurance companies had been mentioned had nothing to do with the case and that no insurance company was involved.

In considering this case we find that on examination of the plaintiff when he was called to the stand, he was asked to relate

and was informed that there were garages in the neighborhood, and that at plaintiff's request this witness called a garage and was told to give plaintiff a garage ticket; that plaintiff went to his room and about 11 o'clock p.m. (the exact hour slipped his mind) that he tipped the valeter and requested the witness to take his car into the garage at 12:00 p.m., at which time the witness would have finished with his work; that the witness, about 11 p.m. changed his clothes and took the car out on a joy ride, and that the car was hit by a truck and wrecked.

Other witnesses testified as to the value of the automobile, and the hotel clerk testified that he did not receive the keys to the car from the plaintiff, nor did he tell the plaintiff that the hotel would take care of his car in a garage of its own.

It is apparent from this record that the evidence was for the jury to pass upon, and under the instructions of the court determine the veracity of the witnesses, the weight of the evidence, and whether or not the plaintiff had established his case by a preponderance of the evidence. The question is largely one of fact and we must determine whether the verdict of the jury and the judgment entered thereon was manifestly against the weight of the evidence. While the evidence is disputed, we cannot from this record conclude that the jury was not justified in returning the verdict which it did.

The defendants contend that evidence showing the written carried insurance policies covering the property involved in this case tended to prejudice the jury, and was error notwithstanding the court's instructions to the jury that the fact that insurance companies had been mentioned had nothing to do with the case and that no insurance company was involved.

In considering this case we find that on examination of the plaintiff when he was called to the stand, he was asked to relate

a conversation had by him with the defendants on the morning of July 5, 1933, in the office of Mr. Schoenstadt, one of the defendants present. He stated, in substance, that Mr. Schoenstadt notified the plaintiff that his car had been stolen; that it was wrecked and that the hotel would "make it good," and mentioned the fact that the garage had insurance, also the hotel, and that the parties were responsible. From the record it would seem that no objection was made by the defendants at that time. Subsequently, the plaintiff, upon examination, testified that on one occasion an adjuster from the insurance company was present, and the matter was discussed, to which testimony the defendants objected and the court sustained their objection. Notwithstanding the objectionable feature of this evidence the defendant Schoenstadt when called as a witness for the defense testified that he inquired of the plaintiff if he was covered by insurance, and it also appears that the attorney for the defendants asked the plaintiff this question on cross-examination:

> "Mr. Feldman: Isn't it a fact that you said that you were fully insured with an insurance company in New York and they said they would take car of the damage for you?"

which question emphasized the fact that insurance was carried by the parties on the property in question, and by reason of which the defendants are not in a position to complain that the evidence regarding the insurance was prejudicial. While the general rule is that it is improper to call attention to the fact that the parties are covered by insurance, still the surrounding circumstances under which this matter was brought to the jury must be considered. We find that a witness was called upon to state a conversation had with the defendants, and it appears from this conversation that all of the parties to the unfortunate loss were covered by insurance. Although this was wholly immaterial, it does not appear that any objection to it was made. Subsequently, the defendants offered

a conversation had by him with the defendants on the morning of July 1, 1932, in the office of Mr. Schoenstadt, one of the defendants present. He stated, in substance, that Mr. Schoenstadt notified the plaintiff that his car had been stolen; that it commenced rain; the motor would "miss it good", and unscrewed the fuel tank pump and inspected, also the coil, and that the parties were responsible. From the record it would seem that no objection was made by the defendants at that time. Subsequently, the plaintiff, upon examination, testified that on one occasion an adjuster from the insurance company was present, and the latter was discussed, in which testimony the defendants objected and the court sustained their objection. Notwithstanding the objectionable feature of this evidence the defendant Schoenstadt was called as a witness for the defense testified that he inquired of the plaintiff if he was covered by insurance, and it also appears that the attorney for the defendants asked the plaintiff this question on cross-examination:

> "Mr. Feldman: Isn't it a fact that you said that you were fully insured with an insurance company in New York and they said they would take care of the damage for you?"

which question emphasized the fact that insurance was carried by the parties on the property in question, and by reason of which the defendants are not in a position to complain that the evidence regarding the insurance was prejudicial. While the general rule is that it is improper to call attention to the fact that the parties are covered by insurance, still the surrounding circumstances under which this matter was brought in the jury must be considered. It is find that a witness was called upon to state a conversation had with the defendants, and it appears from this conversation that all of the parties to the unfortunate loss were covered by insurance. Although this was wholly immaterial, it does not appear that any objection to it was made. Subsequently, the defendants offered

objection to a part of the conversation had with the defendants regarding the adjuster of an insurance company. The court sustained the objection of the defendants and instructed the jury to disregard anything that was said upon the question of insurance. Notwithstanding all this, the defendants, as we have indicated in this opinion, persisted in putting the question to the plaintiff as to whether or not he carried insurance, It does not seem from the facts in this case that the defendants having asked such question through their attorney, can take advantage of an error of which they themselves are guilty. We believe that under the circumstances we would not be justified in considering the evidence on insurance reversible error.

The remaining question to be considered is the motion for a new trial based on newly discovered evidence by the defendants. The motion upon this ground is addressed largely to the sound discretion of the trial court. The newly discovered evidence called to our attention is: That since the trial the defendants had secured a certified copy of an application for a license from the Secretary of State of the State of New York. From this application it appears that the car alleged to have been owned by the plaintiff bore a New York license number 6Y-7485, and it further appears that one Adremis Bedrosian was the owner of the automobile in question, and that this automobile bore this license plate from July 4, 1933 to the date of the judgment, which was entered on June 5, 1934.

The defendants from their affidavit do not appear to have exercised due diligence in their effort to show they were prevented from obtaining the evidence that they now offer as to the ownership of the car. The license plate was on the car, and

objection to a part of the conversation had with the defendants regarding the adjuster of an insurance company. The court sustained the objection of the defendants and instructed the jury to disregard anything that was said upon the question of insurance. Notwithstanding all this, the defendants, as we have indicated in this opinion, persisted in putting the question to the plaintiff as to whether or not he carried insurance. It does not seem from the facts in this case that the defendants having asked such question through their attorney, can take advantage of an error of which they themselves are guilty. We believe that under the circumstances we would not be justified in considering the evidence on insurance reversible error.

The remaining question to be considered is the motion for a new trial based on newly discovered evidence by the defendants. The motion upon this ground is addressed largely to the sound discretion of the trial court. The newly discovered evidence called to our attention is: That since the trial the defendants had secured a certified copy of an application for a license from the Secretary of State of the State of New York. From this application it appears that the car alleged to have been owned by the plaintiff bore a New York license number GY-7485, and it further appears that one Adrenia Benjamin was the owner of the automobile in question, and that this automobile bore this license plate from July 4, 1933 to the date of the judgment, which was entered on June 2, 1934.

The defendants from their affidavit do not appear to have exercised due diligence in their efforts to show they were prevented from obtaining the evidence that they now offer as to the ownership of the car. The license plate was on the car, and

if defendants had written to the Secretary of State of New York they could have obtained the evidence before the trial that is now offered by them for the first time after the verdict of the jury and judgment. The loss of the automobile occurred long before the case was reached for trial, and under the facts and circumstances as they appear in the record, the court exercised such discretion as it was permitted to exercise in disposing of this motion for a new trial. The Court's denial was not erroneous, and therefore it was not an act which would justify a reversal.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

37932

ARTHUR J. SCHMITT,

Plaintiff - Appellant,

v.

J. PILLING WRIGHT, CONTINENTAL - DIAMOND FIBRE COMPANY, et al.,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

283 I.A. 628

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a decree of the Superior Court of Cook County dismissing the bill of complaint for want of equity. The decree was entered after the court sustained the defendants' general demurrer and the special demurrer on the ground of plaintiff's laches, the plaintiff electing to stand by his amended bill of complaint.

The amended bill filed by the plaintiff charges that he was the owner of 194-2/3 shares of the total issue of 200 shares of the capital stock of Walnart Electric Mfg. Co., a corporation, which had been transferred by him to the Continental Fibre Co., a corporation, organized and existing under the laws of the State of Delaware, as security for an indebtedness of $86,726.13, due from the Walnart Electric Mfg. Co. to the Continental Fibre Company for raw materials sold and delivered to the Walnart Electric Mfg. Co. Walnart Electric Mfg. Co. was organized on November 21, 1922 by the plaintiff to engage in the business of manufacturing and dealing in bakelite parts for radio assemblers. Plaintiff had developed a method of punching bakelite, a non-conductor of electricity, used in radio manufacture, which was a vast improvement in the drilling methods.

Opinion filed Dec. 27, 1935

MR. JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a decree of the Superior Court of Cook County dismissing the bill of complaint for want of equity. The decree was entered after the court sustained the defendants' general demurrer and the special demurrer on the ground of plaintiff's laches, the plaintiff electing to stand by his amended bill of complaint.

The amended bill filed by the plaintiff charges that he was the owner of 1840-2/3 shares of the total issue of 3000 shares of the capital stock of Reinert Electric Mfg. Co., a corporation, which had been transferred by him to the Continental Fibre Co., a corporation, organized and existing under the laws of the state of Delaware, as security for an indebtedness of $80,728.15, due from the Reinert Electric Mfg. Co. to the Continental Fibre Company for raw materials sold and delivered to the Reinert Electric Mfg. Co. Reinert Electric Mfg. Co. was organized on November 21, 1920 by the plaintiff to engage in the business of manufacturing and dealing in bakelite parts for radio accessories. Plaintiff had developed a method of punching bakelite, a non-conductor of electricity, used in radio manufacture, which was a vast improvement in the drilling methods.

It appears from the bill that Walnart Electric Mfg. Co. earned a profit of $24,155.17 for the year 1923, and $51,632.63 for the year 1924. It also appears from the bill that the Continental Fibre Company had its factory and branch office in Newark, Delaware. It was a large manufacturer of vulcanized fibre and laminated bakelite, for which Walnart was a customer. In September of 1922, the defendant, the Continental Fibre Co., through its agent, learned that the plaintiff had discovered the secret of punching bakelite, and in 1923, an arrangement was made between the Walnart Electric Mfg. Co. and the Continental Fibre Company, whereby the former processed materials under the punching process, and forwarded the finished products direct to Continental Fibre Co. customers.

It is also charged in the bill that the Continental Fibre Company, through its officers and agents, together with the defendants, Wright, Bonham and Yates, planned to obtain control of Walnart Electric Mfg. Co., and to appropriate the punching process to its and their own use. Following this plan, the Continental Fibre Co., through its agents, urged Walnart Electric Mfg. Co. and its agents, to accept large shipments of raw materials on credit under its promise that payment therefor would be required only as it was convenient to Walnart Electric Mfg. Co., and persuaded its officers to transfer its bank loans from Chicago to a bank in Wilmington, Delaware. On December 31, 1924, Walnart Electric Mfg. Co. owed the Continental Fibre Co. $65,847.66, and the Wilmington Trust Company, $34,821.30. On May 4, 1925, the debt to the Continental Fibre Company had increased to $86,762.13, and to the Trust Company to $77,000. About this time the Continental Fibre Company demanded payment of its debt and threatened bankruptcy

It appears from the bill that Valmont Electric Mfg. Co. earned a profit of $34,188.17 for the year 1922, and $41,322.83 for the year 1924. It also appears from the bill that the Continental Fibre Company had its factory and branch office in Newark, Delaware. It was a large manufacturer of vulcanized fibre and laminated bakelite, for which Valmont was a customer. In September of 1922, the defendant, the Continental Fibre Co., through its agent, learned that the plaintiff had discovered the secret of producing bakelite, and in 1923, in arrangement was made between the Valmont Electric Mfg. Co. and the Continental Fibre Company, whereby the former promised materials under the pending patents, and forwarded the finished products direct to Continental Fibre Co. customers.

It is also charged in the bill that the Continental Fibre Company, through its officers and agents, together with the defendants, Wright, Dunham and Vesen, planned to obtain control of Valmont Electric Mfg. Co., and to appropriate the pending process to its and their own use. Following this plan, the Continental Fibre Co., through its agents, urged Valmont Electric Mfg. Co. and its agents, to accept large shipments of raw materials on credit under its promise that payment therefor would be required only as it was convenient to Valmont Electric Mfg. Co., and persuaded its officers to transfer its bank loans from Chicago to a bank in Wilmington, Delaware. On December 31, 1924, Valmont Electric Mfg. Co. owed the Continental Fibre Co. $38,447.60, and the Wilmington Trust Company, $24,881.50. On May 4, 1925, the debt to the Continental Fibre Company had increased to $85,728.12, and to the Trust Company to $77,000. About this time the Continental Fibre Company demanded payment of its debt and threatened bankruptcy

proceedings on failure to liquidate. Walnart Electric Mfg. Co. at the time was solvent, but had frozen assets, and a bankruptcy petition would have ruined the company, the plaintiff having no other means or banking resources to satisfy this creditor.

The Continental Fibre Co. agreed through its agent, as an alternative, that it would take over Walnart Electric Mfg. Co. for a four year period to see if the debt could be worked out. A written agreement was prepared, dated May 4, 1925, whereby the plaintiff transferred 194-2/3 shares of stock in the Walnart Electric Mfg. Co. to the defendants Wright and Bonham. Wright and Bonham then became directors and officers of the Walnart Electric Mfg. Co., they were also officers and agents of the Continental Fibre Co., and throughout the transaction acted in its interest. The agreement was signed by the plaintiff and the defendant, Continental Fibre Company, and provided that the Continental Fibre Co. and J. Pilling Wright should have the sole right to vote the stock and should have "full and sole control over the management, business, financing, employment, purchases, and all other business relating to and concerning" Walnart Electric Mfg. Co.

The agreement further provided that if within four years Continental Fibre Co. should be paid the sums due, by Walnart Electric Mfg. Co. or the plaintiff, the 194-2/3 shares of stock would be retransferred to the plaintiff, but if the stock was not so retransferred within four years, it should become the absolute property of the Continental Fibre Co., discharged of all claims and rights of the plaintiff.

The plaintiff remained in nominal charge of the Walnart Electric Mfg. Co. from May 4, 1925 to September 30, 1926, although after June, 1925, the defendant, Anderson, had been acting as an officer of the Walnart Electric Mfg. Co. On September 10, 1925,

proceedings on failure to liquidate. Volpert Electric Mfg. Co. at the time was solvent, but had frozen assets, and a bankruptcy petition would have ruined the company, the plaintiff having no other means of making recovery to satisfy its claim.

The Continental Fibre Co. argued caveat lector, as an alternative, that it could take over Volpert Electric Mfg. Co. for a four year period to see if the debt could be wrung out. A written agreement was prepared. Dated July 4, 1902, whereby the plaintiff transferred 1240-G/2 shares of stock in the Volpert Electric Mfg. Co. to the defendants right and wrong. Eight and Bonnie then became directors and officers of the Volpert Electric Co., they were also officers and agents of the Continental Fibre Co., and throughout the transaction acted in its interest. The agreement was signed by the plaintiff and the defendant, Continental Fibre Company, and provided that the Continental Fibre Co. and J. Pilling Eight should have the sole right to vote the stock and manage the Volpert Electric Co. Bonnie, Eight, Pilling, engineer, employees, and all other business relating to and concerning" Volpert Electric Mfg. Co.

The agreement further provided that if within four years Continental Fibre Co. should be paid the sum due, by Volpert Electric Mfg. Co. on the plaintiff, the 1240-G/2 shares of stock would be returned to the plaintiff, but if the stock was not so returned within four years, it should become the absolute property of the Continental Fibre Co., discharged of all claims and rights of the plaintiff.

The plaintiff remained in nominal charge of the Volpert Electric Mfg. Co. from May 4, 1902 to September 30, 1902, although after June, 1902, the defendant, Anderson, had been acting as an officer of the Volpert Electric Mfg. Co. On September 30, 1902,

Anderson received the following instructions from the defendant J. Pilling Wright, and proceeded to act thereunder:

> "As our representative and as an officer of the Walnart Company, having charge of their business activities, it is necessary at all times for you to keep in close touch with every operation in the factory, everything that is done all kinds and description, just as if you were the owner of the Company. Take that attitude and you will not go far wrong. * * *"

About September 30, 1926, the plaintiff was advised by J. Pilling Wright that he would no longer be in charge of the Walnart Electric Mfg. Co., but that the defendant, Anderson, would operate the company under the directions of the Continental Fibre Company's home office. The plaintiff was made a salesman for the Continental Fibre Co., travelling in the states of Ohio, Michigan, Wisconsin and Minnesota. He occupied this position until April 1, 1929, when he was made district manager for the Continental-Diamond Fibre Co. at Cleveland, Ohio, where he made his headquarters until May, 1932 when he was discharged. During all this time, plaintiff was without knowledge of what happened in the Chicago factory of Walnart Electric Mfg. Co., and without knowledge of the true state of the indebtedness of the Walnart Electric Mfg. Co. to the Continental Fibre Co., or to the Continental-Diamond Fibre Co.

On January 28, 1929, the plaintiff received a letter signed by J. Pilling Wright in which the Company inquired of the plaintiff whether he wished to redeem his stock in the Walnart Electric Mfg. Co. Plaintiff thereupon replied and asked the amount of the debt and what terms Continental Fibre Co. would allow Walnart on raw materials. The reply from the Continental Fibre Co. was that the Walnart Electric Mfg. Co. owed it $216,687.60, as of February 1, 1929, and that it would in no way cooperate with an independent fabricator in the radio field.

Minutes received the following instructions from the interest:

4. Filling Fight, and interest in our [illegible]:

"In our [illegible] and on an affidavit of the [illegible] Company, having change of their business activities, it is necessary at all times for you to keep in close touch with every department in the Company, especially that is [illegible] all kinds and descriptions, just as if you were [illegible] of the Company. This [illegible] attitude and you will not go far wrong."

About September 30, 1928, the plaintiff was advised by 4. Filling Fright that he would no longer be in charge of the Valiant Electric Mfg. Co., but that the Automobile, instead, would operate the company under the directions of the Continental Fibre Company's home office. The plaintiff was made a salesman for the Continental Fibre Co., travelling in the states of Ohio, Michigan, Wisconsin and Minnesota. He occupied this position until April 1, 1929, when he was made district manager for the Continental-Diamond Fibre Co. at Cleveland, Ohio, where he made his headquarters until May, 1929 when he was discharged. During all this time, plaintiff was without knowledge of what happened in the Chicago factory of Valiant Electric Mfg. Co., and without knowledge of the true state of the indebtedness of the Valiant Electric Mfg. Co. to the Continental Fibre Co., or to the Continental-Diamond Fibre Co.

On January 28, 1929, the plaintiff received a letter signed by 4. Filling Fright in which the Company inquired of the plaintiff whether he wished to reduce his stock in the Valiant Electric Mfg. Co. Plaintiff thereupon replied and asked the amount of the debt and what terms Continental Fibre Co. would allow Valiant on raw materials. The reply from the Continental Fibre Co. was that the Valiant Electric Mfg. Co. owed it $[illegible],[illegible].00, as of February 1, 1929, and that it would in no way cooperate with an independent Manufacturer in the radio field.

It also appears from the bill that on December 31, 1928, Continental Fibre Co. had merged with the Diamond State Fibre Co. under the corporate name of Continental-Diamond Fibre Co. All of the Continental Fibre Co. and the Walnart assets were taken over by the Continental-Diamond Fibre Co. the latter company having full knowledge of the facts. The Continental Fibre Co. was dissolved as a corporation on March 28, 1929, and on April 17, 1929, after it was dissolved, the Continental Fibre Company purported to advise plaintiff that on May 4, 1929, it was its intention to close up the Walnart Electric Mfg. Co. and transfer all its property to the Continental-Diamond Fibre Co. On May 2, 1929, plaintiff advised that he lacked sufficient funds to pay $216,687.60, and that he did not contemplate the purchase of Walnart Electric Mfg. Co. stock, but that he left it to the Continental Fibre Co. to close out the contract and liquidate all claims in accordance with its best judgment. Plaintiff, who was then in Cleveland, Ohio, executed proxies to Wright for a stockholders' meeting to be held in Chicago on May 10, 1929, and for directors' meetings to be held at Newark, Delaware, on May 9th and 13, 1929.

On May 14, 1929, Walnart Electric Mfg. Co. deeded the real estate owned by it at 308 South Green Street, Chicago, Illinois to the Continental-Diamond Fibre Co., which still holds title to the same. No improvements or mortgages have been placed thereon, but the premises were abandoned as a factory by Continental-Diamond Fibre Co. on March 31, 1931, and the machinery and equipment located therein was removed to 2130 North Racine Avenue, Chicago, and property likewise owned by the Continental-Diamond Fibre Co. This

It also appears from the bill that on December 21, 1922, Continental Fibre Co. had merged with the Diamond State Fibre Co. under the corporate name of Continental-Diamond Fibre Co. All of the Continental Fibre Co. and the Delaware Fibre were taken over by the Continental-Diamond Fibre Co. the Darby company being the exception at the date. The Continental Fibre Co. was liquidated as a corporation on March 30, 1923, and on April 17, 1924, after it was dissolved, the Continental Fibre Company reported to divine plaintiff that on May 4, 1923, it was its intention to close up the Delaware Electric Mfg. Co. and transfer all its property to the Continental-Diamond Fibre Co. On May 1, 1923, plaintiff advised that he lacked sufficient funds to pay $18,987.00, and that he did not contemplate the purchase of Delaware Electric Mfg. Co. stock, but that he left it to the Continental Fibre Co. to close out the contracts and liquidate all claims in accordance with its best judgment. Plaintiff, who was then in Cleveland, Ohio, received passes to fight for a stockholders' meeting to be held in Chicago on May 10, 1923, and for directors' meetings to be held at Newark, Delaware, on May 8th and 12, 1923.

On May 14, 1923, Delaware Electric Mfg. Co. deeded the real estate owned by it at 308 South Green Street, Chicago, Illinois to the Continental-Diamond Fibre Co., which still holds title to the same. No improvements or mortgages have been placed thereon, but the premises were abandoned as a factory by Continental-Diamond Fibre Co. on March 31, 1923, and the machinery and equipment located therein was removed to 2130 North Racine Avenue, Chicago, and property likewise owned by the Continental-Diamond Fibre Co. This

plant was operated until September 1, 1932, by the Continental-Diamond Fibre Co., when it was closed and the machinery and equipment was removed to parts unknown to plaintiff.

Between September 30, 1926 and December 31, 1928, the Continental Fibre Company operated the Walnart Electric Mfg. Co. property and manufactured and sold $2,015,000 of products, formerly manufactured by Walnart Electric Mfg. Co. at a profit of $505,000. On October 1, 1926, Continental took over from the Walnart Electric Mfg. Co. $17,744.61 in cash, $40,439.41 in accounts receivable, which it collected and $120,740.83, in inventory which it sold, a total of $178,924.65.

During the period from October 1, 1926, to December 31, 1928, the Continental Fibre Company defrayed obligations of the Walnart Electric Mfg. Co. existing at the time of the take-over of the business in the amount of $229,501.61. The bill then states on information and belief, the facts all being in the possession of the Continental-Diamond Fibre Company and J. Pilling Wright, that the debts of Walnart Electric Mfg. Co. to the Continental-Diamond Fibre Co. and the Wilmington Trust Company, and all other obligations,had been discharged, and Continental Fibre Company was indebted to Walnart Electric Mfg. Co. on December 31, 1928 in the amount of $327,910.79; that plaintiff did not learn any of these facts until the summer of 1932.

On October 1, 1926, the Continental Fibre Co. was authorized as a foreign corporation to do business in Illinois, representing that it had property in this state worth $180,600, but the property it claimed as its own was the property of the Walnart Electric Mfg. Co., which it was operating through J. Pilling Wright under the May 4, 1925 agreement, and it had no other property in this state. It continued so to claim ownership of the property until Continental-Diamond Fibre Co. was authorized to do business

plant was operated until September 1, 1922, by the Continental-Diamond Fibre Co., when it was closed and the machinery and equipment was removed to other centres in Canada.

Between September 30, 1922 and December 31, 1922, the Continental Fibre Company operated the Valmont Electric Co. Co. property and manufactured and sold 12,012,000 of product, formerly manufactured by Valmont Electric Mfg. Co. at a profit of $208,000. On October 1, 1922, Continental took over from the Valmont Electric Mfg. Co. $17,744.22 in cash, $42,182.22 in accounts receivable, which it collected and $120,720.00, in inventory which it sold, a total of $179,646.44.

During the period from October 1, 1922, to December 31, 1922, the Continental Fibre Company returned obligations of the Valmont Electric Mfg. Co. existing at the time of the take-over of the business in the amount of $202,401.41. The bill then asks an interpretation and ruling, the facts all being in the possession of the Continental-Diamond Fibre Company and J. Filling Ralph, that the debts of Valmont Electric Mfg. Co. to the Continental-Diamond Fibre Co. and the Wilmington Trust Company, and all other obligations, had been discharged, and Continental Fibre Company was indebted to Valmont Electric Mfg. Co. on December 31, 1922 in the amount of $208,000.00; that plaintiff did not leave any of these funds until the summer of 1923.

On October 1, 1921, the Continental Fibre Co. was authorized by a foreign corporation to do business in Illinois, notwithstanding this it had property in this state worth $140,000, but the property it claimed as its own was the property of the Valmont Electric Mfg. Co., which if the statutory remedy J. Filling Ralph under the May 4, 1921 Act-Assent, and it had no other property in this state. It continued to claim ownership of the property until Continental-Diamond Fibre Co. was authorized to do business

in Illinois on April 1, 1929, claiming to own property in this state worth $1,346,680, but the only property it claimed was two properties of about equal value, one of which was the Walnart property.

From January 1, 1929, to December 31, 1930, Continental Fibre Co. and the Continental-Diamond Fibre Co. manufactured and sold goods in the Walnart Electric Mfg. Co. factory worth $3,350,000, making a net profit of $962,500, which was not accounted for to the Walnart Electric Mfg. Co. The bill further stated that on December 31, 1932, by reason of the profits dervied from the operation of the Walnart business, Continental-Diamond Fibre Co. owes Walnart Electric Mfg. Co. $2,024,069.51, including interest with annual rests.

The bill prays redemption, and an accounting of the profits from the operation of the Walnart plant to be distributed to the proper Walnart Electric Mfg. Co. stockholders, and a decree that Continental-Diamond Fibre Co. convey the real estate at 308 South Green Street, Chicago, to the Walnart Electric Mfg. Co. stockholders, Walnart Electric Mfg. Co. having been dissolved on June 25, 1930 by the acts of these defendants, and prays general relief.

One of the points urged by the defendants is that material allegations of fact must be positively averred; that allegations upon information and belief do not amount to positive allegations of fact, and that where general allegations of fraud are made, the bill should point out and state the particular facts and circumstances relied upon as constituting the fraud.

It must be admitted in this case that the facts stated in the amended bill of complaint that led up to the execution of the contract of May 4, 1925, were positive in their character and were not such as were alleged on information and belief. Therefore

in Illinois on April 1, 1929, claiming to own property in this state worth $1,344,000, but the only property it claimed was two properties of about equal value, one of which was the Belmont property.

From January 1, 1929, to December 31, 1929, Continental Tire Co. and the Continental-Diamond Tyre Co. manufactured and sold goods in the Walmart Electric Mfg. Co. factory worth $2,300,000, making a net profit of $458,303, which was not accounted for to the Walmart Electric Mfg. Co. The bill further states that on December 31, 1929, by reason of the profits derived from the operation of the Walmart business, Continental-Diamond Tyre Co. owes Walmart Electric Mfg. Co. $1,181,904.41, including interest with annual rests.

The bill prays redemption, and an accounting of the profits from the operation of the Walmart plant to be distributed to the Walmart Electric Mfg. Co. stockholders, and a decree that Continental-Diamond Tyre Co. convey the real estate at 502 South Green Street, Chicago, to the Walmart Electric Mfg. Co. stockholders, Walmart Electric Mfg. Co. having been dissolved on June 28, 1930 by the vote of these defendants, and prays general relief.

One of the points urged by the defendants is that material allegations of fact must be positively averred; that allegations upon information and belief do not amount to positive allegations of fact, and that where general allegations of fraud are made, the bill should point out and state the particular facts and circumstances relied upon as constituting the fraud.

It must be admitted in this case that the facts stated in the amended bill of complaint that led up to the execution of the contract of May 4, 1928, were positive in their character and were not such as were alleged on information and belief. Therefore

applying the rule that by demurrer the allegations of fact must be held to have been taken as true, we find from the bill the fact is established that the character of the business carried on by the plaintiff, and the character of the work, together with the process of punching bakelite, were of value to the business conducted by the defendant. It is worthy of note that the defendant, Continental Fibre Co. was desirous of obtaining the business, as well as the method of punching bakelite, a non-conductor used in the manufacture of radios, as evidenced from the contract finally consummated, which we believe was at the suggestion of the defendants.

This contract provides that the plaintiff, Arthur J. Schmitt was to transfer to J. Pilling Wright 194-2/3 shares of the common stock of Walnart Electric Mfg. Co., a corporation in order to give control to the defendant, Continental Fibre Co., and as a result all the directors in office at the time resigned, and directors satisfactory to the defendant company were elected and substituted.

It is well to consider in this connection that there was no absolute transfer of the properties of the Walnart Electric Mfg. Co., but that the transfer took place only to secure the payment of the amount due the Continental Fibre Co. In considering this contract we must also bear in mind that while this control was in the hands of the defendants, they, the defendants, were to manage and conduct the business of financing, employment, purchase of materials, and such other matters relating to and concerning the Walnart Electric Mfg. Company, for a period of four years, or until the plaintiff, Arthur J. Schmitt, was repossessed or again became the owner by reassignment of the stock in question, and if at any time within the period of four years from the date of the signing of this contract the Walnart Electric Mfg. Co., or Arthur J. Schmitt, repaid the Continental Fibre Company from the receipts of the business the

applying the rule that by descent the allegations of fact must be held to have been taken as true, we find from the bill the fact is established that the character of the business carried on by the plaintiff, and the character of the work, together with the process of punching pebbles, were of value to the business conducted by the defendant. It is worthy of note that the defendant, Continental Fibre Co. was desirous of obtaining the business, as well as the method of punching pebbles, a non-conductor used in the manufacture of radios, as evidenced from the contract finally consummated, which we believe was at the suggestion of the defendants.

The question presents that the plaintiff, Arthur A. Schmitt was to transfer to D. Frazing Wright Inc.-N.Y. shares of the common stock of Valmont Electric Mfg. Co., a corporation in order to give control to the defendant, Continental Fibre Co., and as a result all the directors in office at the time resigned, and directors satisfactory to the defendant company were elected and substituted.

It is well to consider in this connection that there was no absolute transfer of the properties of the Valmont Electric Mfg. Co., but the transfer took place only to secure the payment of the amount due the Continental Fibre Co. In considering this contract we must also bear in mind that while this control was in the hands of the defendants, they, the defendants, were to manage and conduct the business of financing, employment, purchase of materials, and such other matters relating to and concerning the Valmont Electric Mfg. Company, for a period of four years, or until the plaintiff, Arthur A. Schmitt, was repaid or again become the owner by reassignment of the stock in question, and if at any time within the period of four years from the date of the signing of this contract the Valmont Electric Mfg. Co., or Arthur A. Schmitt, repaid the Continental Fibre Company from the receipts of the business the

sum claimed to be due, then the Continental Fibre Co. contract would terminate. It necessarily follows that in the conduct of the business of the Walnart Electric Mfg. Co., the Continental Fibre Co. was to act in good faith, and if during the limited period of this contract sufficient moneys accumulated to satisfy its claim, it was then the duty of this defendant to turn over the properties it had received.

When the Continental Fibre Company notified the plaintiff that there was due it $216,687.60, it should have notified the plaintiff the means by which it arrived at the amount due, and not stated in its letter addressed to the plaintiff that the Walnart Electric Mfg. Co. became liable for a large sum. Unable to pay its bills, it would have been proper to furnish the items, so that the plaintiff would have been sufficiently informed. It did not inform the plaintiff when it reiterated in this letter that it had special consideration for the pleasant relations that had existed between the Walnart Electric Mfg. Co. and itself, and it did not desire to throw the company into bankruptcy, because that was a matter that had been considered at the time the contract was signed on May 4, 1925. The letter concluded by stating that by working out this scheme and the transfer of the stock, the Walnart Electric Mfg. Co. came into its hands, thereby enabling it to possess the property and liquidate its account. This was no new information, but it would appear that the defendant was willing to advise the plaintiff as to what he already knew, but did not advise him in what manner Walnart Electric Mfg. Co.'s indebtedness was increased, as the Continental Fibre Co. claimed, to $216,687.60, as of February 1, 1929. And then further, without information, it made the statement that the assets were not worth $216,687.60. These facts as they are alleged in the bill, do not

was claimed to be due, then the Continental Ryan Co. would
well-nigh bankrupt. It necessarily follows that in the contract of
the business of the Walmart Electric Mfg. Co., the Continental
Ryan Co. was to act in good faith, and if during the limited
period of this contract sufficient money accumulated to satisfy
its claim, it was then the duty of this defendant to turn over
the properties it had received.

Even the Continental Ryan Company admitted the plain-
tiff that there was due it $218,887.00, it should have notified
the plaintiff the moment by which it derived at the amount due,
and our state is the latter determined by the plaintiff that
the Walmart Electric Mfg. Co. became liable for a large sum.
Unable to pay its bills, it would have been proper to furnish the
items, so that the plaintiff would have been sufficiently informed.
It did not inform the plaintiff when it referred in this letter
that it had special consideration for the pleasant relations that
had existed between the Walmart Electric Mfg. Co. and itself,
and it did not desire to throw the company into bankruptcy, because
this was a matter that had been considered at the time the contract
was signed on May 4, 1928. The letter concluded by stating that
by working out this scheme and the transfer of the stock, the
Walmart Electric Mfg. Co. came into funds, thereby enabling it
to pay the property and liquidate its account. This was no
new information, but it would appear that the defendant was will-
ing to advise the plaintiff as to what he already knew, but did
not advise him in this manner Walmart Electric Mfg. Co. is indeed
where he informed, as the Continental Ryan Co. claimed, to
$218,887.00, as of February 1, 1929. And then further, without
information, it made the statement that the assets were not worth
$218,887.00. These facts as they are alleged in the bill, do not

indicate that there were fair dealings between the parties, nor that the facts appearing in the amended bill were stated by the plaintiff on information and belief.

It would further appear from the bill that certain transactions occurred which were not disclosed to the plaintiff, one of which was the merger of the companies, as charged in the bill, together with the transfer of the Walnart Electric Mfg. Co. properties at that time. The Continental Fibre Co. and the Diamond-State Fibre Co. were merged as of December 31, 1928, and the Continental Fibre Company was dissolved as a corporation on March 28, 1929, after transferring all of the Walnart Electric Mfg. Co. assets to the Continental-Diamond Co., of which through its officers it had full knowledge of the rights of the plaintiff. At the time the plaintiff was notified as to the amount due from the Walnart Electric Mfg. Co. he was not informed that all the assets had been transferred to the new corporation. By that act the properties of the Walnart Electric Mfg. Co. were converted, and it was as much the duty of the Continental-Diamond Fibre Co. to account for the assets it had received from the Continental Fibre Co. under the contract of May 4, 1925, as of the Continental Fibre Co. It is to be noted that the transfer of this property took place long before the contract of May 4, 1925 would have expired, which transfer was without the knowledge and consent of the plaintiff. The properties held under this contract were transferred for but a single purpose, and that was to satisfy the claim of the Continental Fibre Co., and as we have stated before, it held this property in a fiduciary capacity, and its rights under it were limited by the terms agreed upon by the parties. The property so-called which created the fund was trust property, and if the Continental Fibre Co. improperly used the fund, the plaintiff would be entitled to

indicate that there were fair dealings between the parties, nor that the facts appearing in the amended bill were stated by the plaintiff on information and belief.

It would further appear from the bill that certain transactions occurred which were not disclosed to the plaintiff, one of which was the merger of the companies, as charged in the bill, together with the transfer of the Walnert Electric Mfg. Co. properties at that time. The Continental Fibre Co. and the Diamond-State Fibre Co. were merged on of December 31, 1922, and the Continental Fibre Company was dissolved as a corporation on March 28, 1923, after transferring all of the Walnert Electric Mfg. Co. assets to the Continental-Diamond Co., of which through its officers it had full knowledge of the rights of the plaintiff. At the time the plaintiff was notified as to the amount due from the Walnert Electric Mfg. Co. he was not informed that all the assets had been transferred to the new corporation. By that act the properties of the Walnert Electric Mfg. Co. were converted, and it was as much the duty of the Continental-Diamond Fibre Co. to account for the assets it had received from the Continental Fibre Co. under the contract of May 4, 1922, as of the Continental Fibre Co. It is to be noted that the transfer of this property took place long before the contract of May 4, 1922 would have expired, which transfer was without the knowledge and consent of the plaintiff. The properties held under this contract were transferred for but a single purpose, and that was to satisfy the claim of the Continental Fibre Co., and as we have stated before, it held this property in a fiduciary capacity, and its rights under it were limited by the terms agreed upon by the parties. The property so-called which covered the fund was trust property, and if the Continental Fibre Co. improperly used the fund, the plaintiff could be entitled to

reimbursement. The bill charges that the Continental-Diamond Fibre Co. had knowledge that the funds or assets of the Walnart Electric Mfg. Co., which were in the hands of the Continental Fibre Co., were to be used in the manner provided for in the contract, and having accepted the funds transferred at the time the merger took place, it was bound by the terms under which these properties were held by the Continental Fibre Co., and if liabilities were not properly incurred, plaintiff is entitled to an accounting. Penn v. Fogler, 182 Ill. 76.

The facts stated in the bill indicate a fiduciary relationship, and when established such a relation is sufficient to excite close scrutiny of the acts of the defendant in the disposition of the trust properties. Walker v. Shepard, 210 Ill. 100.

Another question for determination by this court is whether the court erred in sustaining the special demurrer upon the ground of laches. The defendants urged several other grounds, but withdrew for consideration by the Court the question of whether the plaintiff was a proper party to the proceeding, and was without privity as between the plaintiff and the defendants.

As we have indicated in this opinion, there was a suppression of facts, and it does not appear that the defendants were fair in disclosing the facts upon which they arrived at the conclusion that there was the large amount of $216,687.60 due the defendants; while it does appear that at the time plaintiff was advised of this indebtedness he did not have knowledge that the assets of the Walnart Electric Mfg. Co. had been transferred to the consolidated companies, now operating under the name of Continental-Diamond Fibre Company.

During all these proceedings it appears from the amended bill that the plaintiff had confidence and believed in the honesty of the defendants, and relying upon such confidence, he believed that the facts were as related to him by these defendants, until he

reinsurance. The bill charges that the Continental-Diamond Fire Co. had knowledge that the funds or assets of the Reliance Electric Mfg. Co., which were in the hands of the Continental Fire Co., were to be used in the manner provided for in the contract, and having accepted the funds transferred at the time the merger took place, it was bound by the terms under which these properties were held by the Continental Fire Co., and if liabilities were not properly incurred, plaintiff is entitled to an accounting. Ryan v. Fowler, 182 III. 76.

The facts stated in the bill involve a fiduciary relationship, and when established such a relation is sufficient to compels close scrutiny of the acts of the defendants in the disposition of the trust properties. Miller v. Chandler, 93 Ill. 548.

Another question for determination by this court is whether the court erred in sustaining the special demurrer upon the ground of laches. The defendants urge several other grounds, but without for consideration by the Court the question of whether the plaintiff was a proper party to the proceeding, and was without privity as between the plaintiff and the defendants.

As we have indicated in this opinion, there was a suppression of facts, and it does not appear that the defendants were lax in disclosing the facts upon which they arrived at the conclusion that there was the large amount of $216,887.60 due the defendants; while it does appear that at the time plaintiff was advised affirmatively that defendants did not have knowledge that the assets of the Reliance Electric Mfg. Co. had been transferred to the consolidated companies, now operating under the name of Continental-Diamond Fire Company.

During all these proceedings it appears from the amended bill that the plaintiff had confidence and believed in the honesty of the defendants, and relying upon such confidence, he believed that the facts were as related to him by these defendants, until he

learned within a short time before the filing of this bill, that he had been defrauded, as alleged in his bill.

The rule upon the question of laches has been passed upon by our courts of appeal, and whether or not a party is guilty of laches depends upon the particular facts in the case before the court for consideration. In the instant case we believe the rule is applicable that laches will not be imputed where the bill for relief alleges that plaintiff had no knowledge of the facts until a short time before the filing of the bill. And where it appears that there were no circumstances alleged in the bill which should have put a person of ordinary prudence upon inquiry, and it further appears from an averment in the bill that the facts did not come to the plaintiff's attention until a certain period before the filing of the bill, this is an allegation of fact, which is traversable and sufficient without an allegation of the facts and circumstances explaining why the information did not reach the plaintiff at an earlier period. Coolidge v. Rhodes, 199 Ill. 20. Under this ruling, laches cannot be imputed to the plaintiff in the instant case, and we believe this ruling is applicable here where the proceeds received by the Continental Fibre Co. under the contract of May 4, 1925, are now in the possession of the Continental-Diamond Fibre Co. and no intervening rights of third parties are involved, other than the rights of the parties who acquired the property under the terms of the contract and had knowledge of the transactions as they took place. It is a self-evident proposition that a bill will not bar relief in equity against fraud, where the plaintiff, as in this case, was ignorant of the facts until shortly before he commenced his proceedings. Bishop v. Thompson, 196 Ill. 206.

The facts indicate that the plaintiff instituted his bill for relief at as early a time as possible after the discovery

learned within a short time before the filing of this bill, that he had been defrauded, as alleged in his bill.

The rule upon the question of laches has been laced upon by our courts of equity, and adopted as not a hard or quick rule of laches depends upon the particular facts in the case before the court for consideration. In the instant case we believe the rule is applicable that laches will not be imputed where the bill for relief alleges that plaintiff had no knowledge of the facts until a short time before the filing of the bill. And there is evidence that there was no circumstances alleged in the bill which would have put a person of ordinary prudence upon inquiry, and it further appears from an instrument in the bill that the date did not make to the plaintiff's situation until a short time before the filing of the bill. This is an alleged-mistaken fact, which is transmissible and sufficient excuse to allegation of the laches and estoppel arguments explaining the information did not reach the plaintiff at an earlier period. Gualdoni v. Harvey, 140 Ill. 80. Under this ruling, laches cannot be imputed to the plaintiff in the instant case, and we believe this ruling is applicable here where the proceeds received by the Continental Fibre Co. under the contract of May 4, 1928, are now in the possession of the Continental-Diamond Fibre Co. and no intervening rights of third parties are involved, other than the rights of the parties who acquired the property under the terms of the contract and the knowledge of the transactions as they took place. It is a self-evident proposition that a bill will not for relief in equity against fraud, where the plaintiff, as in this case, was ignorant of the facts until shortly before he commenced his proceedings. Ziegler v. Jacobson, 158 Ill. 206.

The facts indicate that the plaintiff instituted his bill for relief at as early a time as possible after the discovery

of the fraud practiced upon him, and the bill indicates from the allegations that he received no notice of any kind that would put him on guard, until after the time the properties were taken possession of by the Continental-Diamond Fibre Co., and by reason of these facts we are of the opinion that the bill should have been sustained and that the court erred in sustaining the special demurrer.

The decree is therefore reversed and the cause remanded for such further steps as may be consistent with the views expressed in this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

of the Fund proceeds upon his, and the bill undoubtedly from the allegations that he received no notice of any kind that would use him on guard, until after the time the properties were taken possession of by the Continental-Diamond Fibre Co., and by reason of these facts we are of the opinion that the bill should have been sustained and that the court erred in sustaining the special demurrer.

The decree is therefore reversed and the cause remanded the same further proceedings as may be consistent with the views expressed in this opinion.

MCKENZIE, J.
DEAN MCMORRISON.

Eldridge, 4.1. 1.2. Smith v. Williams, 1. Sawyer.

37979

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
Oscar Nelson, Auditor of Public Accounts,

v.

CICERO TRUST AND SAVINGS BANK,
a Corporation.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

PETITION OF ELIZABETH A. MINKUS, as successor conservatrix of the Estate of Mary Houda, an insane person,

(Petitioner-Appellee)

283 I.A. 629

v.

WILLIAM L. O'CONNELL, successor receiver of Cicero Trust and Savings Bank, a Corp,

(Respondent-Appellant)

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal by William L. O'Connell, successor receiver of the Cicero Trust and Savings Bank, a corporation, is from a decretal order entered in the Circuit Court of Cook County, allowing as a preferred claim the sum of $7,561.07, the amount deposited in the bank by Anna Prasek, who was appointed conservatrix of the estate of Mary Houda, an incompetent person. Subsequent thereto Elizabeth A. Minkus became her successor, and by leave of court was substituted in the case as the petitioner in lieu of Anna Prasek.

The pleadings are not questioned, and from the record it appears that the matter was referred by the court to a master in chancery, and after hearing the evidence offered by the parties, the Master filed a report, with the recommendation that the court enter an order that the claim for a preference be not allowed. The objections filed with the Master were considered by the court as exceptions, together with the additional exceptions filed by

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal by William L. O'Connell, successor receiver of the Citizens Trust and Savings Bank, a corporation, is from a decretal order entered in the Circuit Court of Cook County, allowing as a preferred claim the sum of $7,861.07, the amount deposited in the bank by Anna Fraser, who was appointed conservatrix of the estate of Mary Bonds, an incompetent person. Subsequent thereto Elizabeth A. Simms became her successor, and by leave of court was substituted in the case as the petitioner in lieu of Anna Fraser.

The pleadings are not questioned, and from the record it appears that the matter was referred by the court to a master in chancery, and after hearing the evidence offered by the parties, the Master filed a report, with the recommendation that the court enter an order that the claim for a preference be not allowed. The objections filed with the Master were considered by the court as exceptions, together with the additional exceptions filed by

the petitioner. These exceptions were sustained, and the court overruled the findings of the Master, and a decretal order was entered by the court allowing the claim as a preference, to be paid in due course of administration.

The facts are substantially as follows: Anna Prasek as conservatrix of the Estate of Mary Houda, insane, filed her sworn petition on January 23, 1932, from which petition and the evidence in support thereof it appears she realized from the sale of certain real estate owned by her ward, $7,678.38, evidenced by two checks of the purchaser, one for $1,500, and the other for the balance of the sale price. She opened an individual savings account in the Cicero Trust and Savings Bank by the deposit of the $1,500 check, and later deposited the second check for $6,178.38. These checks were payable to her order as conservatrix. She withdrew money at different times and, for that purpose, signed her own name on withdrawal slips. She told the vice-president of the bank that the money was not hers. She had a conversation with Mr. Sobotka, vice-president of the bank prior to the closing of the bank, and according to her testimony she went to the bank about the middle of March, 1931, and said to Sobotka, "I want that money," and he said, "No, I won't give it to you. Everyone wants to take his money out and put it in a safety box." She then replied, "That money ain't my money, and if anything happens to it, what am I going to do?" He said, "Well, the bank is still going now. You would not have to be afraid." She further testified, "So, I leave it there." She went home and had a talk with her attorney, a Mr. Bicek, who represented her in the sale of the real estate in the Probate Court, and he advised

the petitioner. These suspicions were sustained, and the court overruled the findings of the master, and a decretal order was entered by the court allowing the claim as a preference, to be paid in the course of administration.

The facts are substantially as follows: Anna Prendergast as executrix of the Estate of Mary Smith, issued her sworn petition on January 21, 1922, from which petition and the evidence in support thereof it appears she realized from the sale of certain real estate owned by her ward, $7,275.50, evidenced by two checks of the purchaser, one for $1,800, and the other for the balance of the sale price. She opened an individual savings account in the Clare Trust and Savings Bank by the deposit of the $1,800 check, and later deposited the second check for $4,175.50. These checks were payable to her order as executrix. She withdrew money at different times and, for that purpose, signed her own name on withdrawal slips. She told the vice-president of the bank that the money was her own. She had a conversation with Mr. Dobbins, vice-president of the bank prior to the closing of the bank, and according to her testimony she went to the bank about the middle of March, 1921, and said to Dobbins, "I want that money," and he said, "No, I won't give it to you. Everyone wants to take his money out and put it in a safety box." She then replied, "That money isn't my money, and if anything happens to it, what am I going to do?" He said, "Well, the bank is still going now. You would not have to be afraid." She further testified, "No, I leave it there." She went home and had a talk with her attorney, a Mr. Hawk, who represented her in the sale of the real estate in the Probate Court, and he advised

her to request Mr. Sobotka to call him. She returned to her home, was taken sick, and three weeks later when she visited the bank it was closed.

Our attention has been called to the act entitled, "An act defining the relations between banks and their depositors with respect to the deposit and collection of checks and other instruments payable in money." Approved July 8, 1931. This act is not controlling in the instant case, as the action accrued before this act became a law.

Questions of like import have been previously before this court on appeal, and the rule of law applicable is that the mere fact there was a deposit of money in the bank and a demand, and refusal to pay the depositor, does not segregate the amount of money from the general fund, nor does the deposited money become a trust fund separate and apart from the general assets of the bank. In order that a deposit may be regarded as separate and apart from the general funds of the bank there must be an understanding that the particular money is to be returned, or the money deposited is to beused or applied for a specific purpose, or the deposit wrongful or illegal. A deposit becomes special where the bank is made an agent or trustee rather than a debtor. People v. Stony Island Sav. Bank, 358 Ill. 118. When the money in the instant case was deposited in the bank by the conservatrix in her individual account, the relation between the bank and herself was that of creditor and debtor. This relation was not changed by the demand for the money deposited and refusal of the bank to pay. The fact that she advised the official of the bank the sum was not hers did not change the character of the deposit. The amount deposited was a general one, and there is nothing in the record which would justify the trial court in

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holding that the petitioner was entitled to a preference.

In the case of The People v. First Italian State Bank, 281 Ill. App. 1, the petitioners deposited moneys in the bank and later made demands, both personal and by money draft. The bank, however, refused to pay, and this court said:

> "We are of the opinion that neither by the presentation of a check in person by the depositor, nor by a demand made through the presentation of a draft by a drawee bank upon a depositary bank and refusal to pay, is the amount segregated from the general fund or the deposited money made a trust fund separate and apart from the general assets; that such act of the debtor in refusing to pay would justify the creditor in maintaining an action to recover the amount due and to participate as a general creditor in the funds of the bank."

Then again in The People ex rel. Nelson v. Bryn Mawr State Bank, 273 Ill. App. 415, this court held that where a depositor in a state bank inquired of a teller therein as to the amount of his account, and wrote a check for the amount on deposit and presented the check and demanded payment, and at the direction of the teller, the check was taken to an officer of the bank for approval, and the officer's approval was endorsed thereon, and upon again presentation by the depositor, the teller began to count out the money for, but thereafter refused to pay the check, and the depositor was then told that the bank was in the hands of the state and had closed. From the facts, the depositor was not entitled, on the theory of a trust fund, to have the amount allowed and paid by the receiver of the bank as a preferred claim.

Upon this same question in the case of The People, et al, v. Chicago Bank of Commerce, 282 Ill. App. 155, this court, after referring to the cases of People v. First Italian State Bank, supra, and People et al. v. Byrn Mawr State Bank, supra, and other authorities, said:

> "Upon the authority of the foregoing decisions, we hold that there was no segregation of petitioner's deposit, no augmentation of the assets of the bank to the extent thereof, and that the relation between petitioner and

holding that the petitioner was entitled to a preference.

In the case of The people v. First Italian State Bank, 282 Ill. App. 1, the petitioners deposited moneys in the bank and later made demands, both personal and by money draft. The bank, however, refused to pay, and this court said:

"We are of the opinion that neither by the presentation of a check in person by the depositor, nor by a demand made through the presentation of a draft by a drawee bank upon a depository bank for refusal to pay, is the amount appropriated from the general fund or the segregated money made a trust fund separate and apart from the general assets; that such act of the debtor in refusing to pay would justify the creditor in maintaining an action to recover the amount due and to participate as a general creditor in the funds of the bank."

Then again in The People ex rel. Nelson v. Byrn Mawr State Bank, 274 Ill. App. 410, this court held that where a depositor in a state bank inquired of a teller therein as to the amount of his account, and wrote a check for the amount on deposit and presented the check and demanded payment, and at the direction of the teller, the check was taken to an officer of the bank for approval, and the officer's approval was endorsed thereon, and upon again presentation by the depositor, the teller began to count out the money for, but thereafter refused to pay the check, and the depositor was then told that the bank was in the hands of the state and had closed. From the facts, the depositor was not entitled, on the theory of a trust fund, to have the amount allowed and paid by the receiver of the bank as a preferred claim.

Upon this same question in the case of The People, et al, v. Chicago Bank of Commerce, 322 Ill. 7pp. 158, this court, after referring to the cases of People v. First Italian State Bank, supra, and People et al. v. Byrn Mawr State Bank, supra, and other authorities, said:

"Upon the authority of the foregoing decisions, we hold that there was no segregation of petitioner's deposit, no augmentation of the assets of the bank to the extent thereof, and that the relation between petitioner and

the bank continued to be that of debtor and creditor.

It is with some reluctance that we reach this conclusion, because the circumstances of the case indicate that the assistant cashier must have known the bank's condition when the petitioner demanded her money and pursued a course of conduct which was evidently calculated to delay payment until the bank had closed its doors at two o'clock. However, the authorities in this State and the decisions of this court have consistently followed the conclusion here reached under similar circumstances, and with the exception of a few jurisdictions which hold otherwise, the rule laid down is generally followed."

For the reasons stated in our opinion, the court erred in entering an order allowing petitioner's claim as a preference to be paid in due course of the administration of the estate by the receiver.

Although there is a question whether a proper demand for payment was made, this court believes the evidence is sufficient to justify the conclusion that the petitioner did make a demand, and the fact that the demand was refused did not make the bank a trustee or the sum deposited a trust fund and entitle the petitioner to a preferred payment. The decree of the Circuit Court is reversed and the cause remanded with directions that the court below modify the decretal order entered by denying petitioner's claim for a preference, and allowing the order heretofore entered by the court to stand as a general claim for the amount found by the court to be due, and to be paid in due course of administration.

The decretal order is reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

HALL, P. J. AND DENIS E. SULLIVAN, J.
CONCUR.

the bank continued to be but of debtor and creditor.

It is also some evidence that we read this conclusion because the stipulation of the case indicates that the assistant cashier must have been the bank's condition when the petitioner demanded her money and pursued a course of conduct which was evidently calculated to delay payment until the bank had closed its doors at the end of the day. However, the authorities in this state and the decisions of this court have consistently followed the conclusion here reached under similar circumstances, and with the exception of a few jurisdictions which hold otherwise, the rule laid down is generally followed.

For the reasons stated in our opinion, the court erred in entering an order allowing petitioner's claim as a preference to be paid in due course of the administration of the estate by the receiver.

Although there is a question whether a proper demand for payment was made, this court believes the evidence is sufficient to justify the conclusion that the petitioner did make a demand, and the fact that the demand was refused did not make the bank a trustee of the sum deposited a trust fund and entitle the petitioner to a preferred payment. The decree of the Circuit Court is reversed and the cause remanded with directions that the court below modify the decretal order entered by denying petitioner's claim for a preference, and allowing the order heretofore entered by the court to stand as a general claim for the amount found by the court to be due, and to be paid in due course of administration.

The decretal order is reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

HALL, J. L. AND DAVIS C. MULLIKEN, J. concur.

37992

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

WILLIAM DAVIS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

283 I.A. 629

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error issued upon request of the defendant to review the judgment of the Municipal Court of Chicago, denying the relief prayed for in a petition in the nature of a writ of error coram nobis. Upon the facts stated, the court erred in sentencing the defendant to confinement at labor in the house of correction in the City of Chicago, for the term of one year, from and after the delivery of the body of said defendant to the superintendent of the house of correction, and in imposing a fine of $1.

The facts as they appear from the record are that the defendant was charged in an information filed in the Municipal Court of Chicago with contributing to the delinquency of a child named Marion Lillian Mason, sixteen years of age. The trial was continued some ten times and the case was finally reached for trial on February 28, 1934. The defendant was thereupon imprisoned in the house of correction, as provided for by the order, until a petition was filed on September 25, 1934, in the Municipal Court of Chicago, in the nature of a writ of error coram nobis, provided for in sec. 21 of the Municipal Court Act and sec. 89 of the Old Practice Act, ch. 110. In this petition the defendant alleges error of fact, in that he had been tried in the Criminal Court of Cook County and found not guilty there of a charge which embraced the particular offense charged in the amended information filed in

Opinion filed Dec. 27, 1935

said court, at a time prior to his trial on the amended information; that he had been inveigled by his attorney into consenting to a plea of guilty to this information entered for him and had been induced by reason of certain false representations of his attorney, which he then believed; and that he was not guilty, as a matter of fact, of the charge purported to be sufficiently charged in the amended information.

On October 30, 1934, after hearing arguments of attorneys for petitioner on certain questions of law raised by the petition, the petitioner being present in court at the time, the trial court denied the request of counsel for the petitioner to put the petitioner on the stand and allow him to testify as to the allegations set up in his petition. The court, however, considered all the facts set up in the petition, under oath, of the petitioner, and to which he would testify if called as a witness. On February 28, 1934, when the case was called for trial, an amended information was filed, and is a part of the record.

Upon the trial of the charge the defendant was represented by counsel, and it appears that the defendant withdrew his plea of not guilty to the information and entered a plea of guilty, and although warned by the trial court of the consequences of such plea, the defendant persisted in said plea of guilty. The court heard evidence of the offense in aggravation and mitigation and thereafter sentenced the defendant to the house of correction for a term of one year and to pay a fine of $1 and costs, and further ordered that the sentences were to run consecutively.

The rule of law is that a motion or petition under sec. 89 ch. 110 of the Old Practice Act was considered the commencement of a new suit, and the error of fact which may be considered by the court must be of some fact which was unknown to the court at the time the judgment was rendered, as well as one which would have

said court, on a time prior to his trial on the charged indictment; that he had been inveigled by his attorney into consenting to a plea of guilty to this indictment charged for the not had been induced by reason of certain false representations of his attorney, which he then believed; and that he was not guilty, as a matter of fact, of the charge purported to be sufficiently charged in the amended indictment.

On October 20, 1924, after hearing arguments of attorneys for petitioner on certain questions of law raised by the petition, the petitioner being present in court at the time, the trial court denied the request of counsel for the petitioner to put the petitioner on the stand and allow him to testify in his behalf and to support his petition. The court, however, considered all the facts set up in the petition, under oath, of the petitioner, and in which he which identify if called as a witness. On October 20, 1924, when the case was called for trial, an amended indictment was filed, and is a part of the record.

Upon the trial of the charge the defendant was represented by counsel, and it appears that the defendant without his plea of not guilty to the indictment and entered a plea of guilty, and although warned by the trial court of the consequences of such plea, the defendant persisted in said plea of guilty. The court heard evidence of the offense in aggravation and mitigation and thereafter sentenced the defendant to the house of correction for a term of one year and to pay a fine of $1 and costs, and further ordered that the sentences were to run consecutively.

The rule of law is that a motion to withdraw plea, on sec. 170 of the Old Practice Act was considered the sufficiency of a new suit, and the error of fact which may be considered by the court must be of some fact which was unknown to the court at the time the judgment was rendered, as well as one which equal care

precluded the rendition of the judgment had it been within the knowledge of the court at the time. Such error of fact must not be one appearing on the face of the record, or one contradicting the finding of the court. In order to establish the facts set up in the petition in this case, the burden of proof was upon the defendant.

The questions here involved are largely of law, and are as to the sufficiency of the allegations in the information in the instant case, or as to some informal defects therein and also as to the sufficiency of the judgment. As questions of law, they must be determined by the court. Such matters as appear on the face of the record are not reviewable on a petition of a writ of error coram nobis.

It is to be noted from this petition that the insufficiency of the allegations in the information in the instant case is called to the attention of this court, and that there were some informal defects therein, which should have been considered by the court upon the trial of this defendant. This all appears on the face of the record and was within the knowledge of the court at the time the trial was had, and the question of knowledge of the court as to the condition of the record could not be raised in a proceeding of this character, but should have been taken advantage of by the defendant by causing a writ of error to issue, so that the court could have considered this question on appeal.

The rule of law applied by us in this case has been considered in People v. Sullivan, 339 Ill. 146, wherein the court said:

> "Section 89 does not abolish the essentials of the proceeding under the writ of error coram nobis. (Mitchell v. King, 187 Ill. 452.) By that section errors of fact committed in the proceedings of a court of record which by the common law could have been corrected by the writ of error coram nobis may be corrected by petition or motion. Such motion or petition is the commencement of a new suit.

precluded the rendition of the judgment and it been within the knowledge of the court at the time. Such error of fact must not be one appearing on the face of the record, or one contradicting the finding of the court. In order to establish the facts set up in the petition in this case, the burden of proof was upon the defendant.

The questions here involved are largely of law, and are as to the sufficiency of the allegations in the indictment in the instant case, or to some informal matters therein not also as to the sufficiency of the judgment. As questions of law, they must be determined by the court. Such matters as appear on the face of the record are not reviewable on a petition of a writ of error coram nobis.

It is to be noted from this petition that the insufficiency of the allegations in the information in the instant case is called to the attention of this court, and that there were issues raised before trial, which should have been considered by the court upon the trial of this defendant. This all appears on the face of the record and was within the knowledge of the court at the time the trial was had, and the question of knowledge of the court as to the condition of the record could not be raised in a proceeding of this character, but should have been taken advantage of by the defendant by suing a writ of error to issue, so that the court could have considered this question on appeal.

The rule of law applied by us in this case has been considered in People v. Quillian, 329 Ill. 146, wherein the court said:

> "Section 89 does not abolish the essentials of the proceeding under the writ of error coram nobis. (Mitchell v. Ring, 197 Ill. 42.) By this section errors of fact committed in the proceedings of a court of record which by the common law could have been corrected by the writ of error coram nobis may be corrected by petition or motion. Such motion or petition is the commencement of a new suit.

> The error of fact which may be assigned in such a proceeding must be of some fact unknown to the court at the time the judgment was rendered as well as one which would have precluded the rendition of the judgment had it been within the knowledge of the court at the time. The error of fact alleged must not be one appearing on the face of the record or one contradicting the finding of the court. Mc Cord v. Briggs & Turivas, 338 Ill. 158; Harris v. Chicago House Wrecking Co. 314 id. 500; Chapman v. North American Life Ins. Co. 292 id. 179; People v. Noonan, 276 id. 430."

This would also apply to informal defects appearing in the amended information filed in this court. The information was before the court, and of course the court had knowledge of the facts as they were set forth, and if any error appears on the face of the record, a petition of this character cannot avail, but must be taken advantage of by a writ of error. It also appears from the statutory provision of the Criminal Code, para. 743, ch. 38, Rev. Stats. of Ill. State Bar Assn. 1935, that

> "All exceptions which go merely to the form of an indictment, shall be made before trial, and no motion in arrest of judgment, or writ of error, shall be sustained, for any matter not affecting the real merits of the offense charged in the indictment."

Therefore, the information on which this defendant was tried was sufficient to apprise him of the criminal act charged, being in the words of the statute.

The contention is made by the defendant that he was inveigled by his attorney into consenting to a plea of guilty to the information for him, by reason of certain false representations of his attorney, which he then believed; that he was not guilty, as a matter of fact, of the charge purported to be sufficiently charged in the amended information. The defendant, however, was warned by the court of the consequences when he withdrew his plea of not guilty to the information and entered the plea of guilty, but the defendant persisted in his plea, and the matter was then disposed of in the manner set forth in this opinion.

In the case of <u>The People</u> v. <u>Schuedter</u>, 336 Ill. 244,

The error of fact which may be charged in such a pleading must be of some fact relating to the court as the plea the judgment was rendered on will, if not which would have prevented the rendition of the judgment but it does within the knowledge of the court at the time. The error of fact alleged must be one occurring on the face of the record or see notwithstanding the finding of the court. Ex Ford v. Ruhlen & Fowler, 326 Ill. 158; Hurtle v. Chicago, Rock Island & Pacific Ry. Co. 114 Ill. 80; Chapman v. North American Life Ins. Co. 240 Ill. 178; People v. Hoffman, 275 Ill. 488.

This would also apply to informal defects appearing in the pleading information filed in this court. The information was before the court, and of course the court had knowledge of the facts as they were set forth, and if any error appears on the face of the record, a petition of this character cannot avail, but must be taken advantage of by a writ of error. It also appears from the statutory provision of the Criminal Code, para. 746, ch. 38, Rev. Stats. of Ill. 1933 (Ill. State Bar Assn. 1938), that

"All exceptions which go merely to the form of an indictment, shall be made before trial, and no motion to arrest or judgment, or writ of error, shall be sustained, for any error not affecting the real merits of the offense charged in the indictment."

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The contention is made by the defendant that he was invegled by his attorney into consenting to a plea of guilty to the information for him. By reason of certain false representations of his attorney, which he then believed; that he was not guilty, as a matter of fact, of the charge purported to be sufficiently charged in the amended information. The defendant, however, was warned by the court of the consequences when he withdrew his plea of not guilty to the information and entered the plea of guilty, but the defendant persisted in his plea, and the matter was then disposed of in the manner set forth in this opinion.

In the case of The People v. Schweder, 382 Ill. 241,

where a like question was raised in a proceeding of this kind, in which it was claimed that certain promises were made and the defendant was told if he would enter a plea of guilty to the crime charged in the indictment he would be sentenced to imprisonment for only fourteen years, and he withdrew his plea of not guilty and entered one of guilty, the court imposed a penalty, upon his plea, of imprisonment in the penitentiary in Joliet for life. In that case the court had knowledge of the inducement made to the defendant to enter such plea, and the court held that the matter was presented and known to the trial judge at the time of the trial, and this action was subject to review, but was not open to review by writ of error coram nobis, and not open to review by motion under sec. 89 of the Practice Act.

The defendant also contends that previous to the hearing upon the information in the Municipal Court of Chicago, he had been tried in the Criminal Court of Cook County and found not guilty upon a charge which embraced the particular offense charged in the amended information upon which he was sentenced for one year to the house of correction. It does not appear from this petition that the trial court's attention was called to the fact by the defendant that in a trial upon the information wherein he entered his plea of guilty the particular offense upon which he had entered a plea of guilty was embraced in the offense charged against him in the indictment on which he was tried in the Criminal Court.

The defendant further contends that the judgment entered by the court is uncertain in that the judgment order sentenced the defendant to imprisonment in the House of Correction for a term of one year and to pay a fine of $1 and costs, and further ordered that the sentences were to run consecutively.

where a like question was raised in a proceeding of this kind, in which it was claimed that certain promises were made and the defendant was told if he would enter a plea of guilty to the crime charged in the indictment he would be sentenced to imprisonment for only fourteen years, and he withdrew his plea of not guilty and entered one of guilty, the court imposed a penalty, upon the plea, of imprisonment in the penitentiary at Joliet for life. In that case the court had knowledge of the inducements made to the defendant to enter such plea, and the court held that the matter was presented and taken up the trial judge at the time of the trial, and this action was proper to permit, but was not open to review by writ of error upon appeal, and not open to review in motion under sec. 82 of the practice act.

The defendant also contends that previous to the hearing upon the information in the Municipal Court of Chicago, he had been tried in the Criminal Court of Cook County and found not guilty upon a charge which embraced the particular offense charged in the complaint upon which he was sentenced for one year to the house of correction. It does not appear from this petition that the trial court's attention was called to the fact by the defendant that in a trial upon the information wherein he entered his plea of guilty the particular offense upon which he had entered a plea of guilty was embraced in the offense charged against him in the indictment on which he was tried in the criminal court.

The defendant further contends that the judgment entered by the court is uncertain in that the judgment order sentenced the defendant to imprisonment in the house of correction for a term of one year and to pay a fine of $1 and costs, and further ordered that the sentences were to run consecutively.

It appears from the petition that on the day the defendant entered his plea of guilty and the court sentenced him after proceeding in the manner stated in the opinion, a certain other case was heard, entitled, "The People of the State of Illinois v. William Davis, No. 37993, now in this court and in which the charge was also that of contributing to the delinquency of a female person named Dorothy Beasley. To this information the defendant entered a plea of guilty. He was sentenced by the court in that case to imprisonment in the house of correction for a period of one year and to pay a fine of $1 and costs, and the court further ordered that the sentences were to run consecutively.

The defendant maintains that the judgment and sentence entered in the case now before this court for consideration is void for uncertainty, and relies largely upon the direction of the court that the sentences run consecutively. The judgment entered by the court does not identify the judgment that is to follow the judgment of the court in the instant case, and we find from an inspection of the mittimus that the confinement in the instant case is dated to begin from the delivery of the body of the defendant to the superintendent of the house of correction. The words in the judgment "to run consecutively", may be considered as surplusage and meaningless, and the judgment which was entered is in all other respects certain.

Upon a similar question, the Supreme Court, in the case of The People v. Graydon, 329 Ill. 398, said:

> "The only question involved in this case is whether or not the sentences of the Superior Court and Criminal Court ran concurrently. The rule of law is well settled that two or more sentences of a defendant to the same place of

It appears from the petition that on the day the defendant entered his plea of guilty and his court reviewed the after proceedings in the county court in the criminal, a certain other case was being, pending. The people of the state of Illinois v. William Jones, No. 27283, was in this county and in which the charge was also that of contributing to the delinquency of a female person named Dorothy Dawsley. To this information the defendant entered a plea of guilty. He was sentenced by the court to that once to imprisonment in the house of correction for a period of one year and to pay a fine of $1 and costs, and the court further ordered that the sentences were to run concurrently.

The defendant maintains that the judgment and sentence entered in the first was before this court for construction is void for uncertainty, and relies largely upon the decision of the court that the sentences are concurrently. The judgment entered by the county court and identify the judgment that is in dollar the judgment of the county in the instant case, and at that time on inspection of the minutes that the confinement in the instant case is dated to begin from the delivery of the body of the defendant to the superintendent of the house of corrections. The words in the judgment "to run concurrently" may be considered as surplusage and unnecessary, and the judgment order was entered in its with where complete herein.

Upon a similar question, the Supreme Court, in the case of The People v. Jordan, 332 Ill. 328, said:

"The only question involved in this case is whether at the sentence of the Superior Court and criminal court was concurrently. The rule of law is well settled that the be more sentences of a defendant to the same term of

> confinement run concurrently in the absence of specific provisions in the judgment to the contrary, and where a defendant is already in execution of a former sentence and the second sentence does not state that the time is to commence at the expiration of the former, the sentences will run concurrently in the absence of a statute providing for a different rule."

For the reason that the judgment before us does not state that the time of this judgment is to commence at the expiration of the former judgment, the judgment of the Municipal Court of Chicago fixing the sentence at one year, is, as we have indicated, to date from the delivery of the body of the defendant to the superintendent of the house of correction.

The order of the trial court upon this petition in the nature of a writ of error coram nobis denying the relief prayed for, is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

38033

LILLIAN RADTKE, Plaintiff- Appellee, v. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Defendant - Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 629

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment of $543.19 in favor of the plaintiff entered on the finding of the Municipal Court of Chicago, in an action on an industrial life insurance policy, which action was instituted by the wife of the insured for the amount due under the policy issued to the husband of the plaintiff by the defendant company. The policy provides for an additional amount if the death of the insured is caused by accidental means.

The defendant issued its policy to the insured, August C. Radtke, payable to his executor, administrator of the estate of the insured, or to his wife, upon receipt by the defendant of due proof of death of the insured. The defendant did pay the death benefit payable under the terms of this policy upon the death of the insured, but refused to pay an additional amount of $500 to be paid upon receipt by the defendant of proof that insured sustained bodily injuries through external violence or accidental means, which resulted in the death of the insured.

The question here involved is one of fact. The insured, August C. Radtke, died on January 30, 1933.

The facts are that the plaintiff left her apartment on January 30, 1933, and was absent until about 5:30 o'clock in the afternoon. Upon her return she met her husband, August C. Radtke, George Arthur Taylor, and two other men, sitting in the living room.

MOORE

LIBERTY MUTUAL

Plaintiff - Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 27, 1935

MR. JUSTICE KENNA DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment of $500.12 in favor of the plaintiff entered on the finding of the municipal court of Chicago, in an action on an industrial life insurance policy, which action was instituted by the wife of the insured for the amount due under the policy issued to the husband of the plaintiff by the defendant company. The policy provides for an additional amount if the death of the insured is caused by accidental means.

The defendant issued its policy to the insured, August 6, Bertie, payable to his executor, administrator of the estate of the insured, or to his wife, upon receipt by the defendant of due proof of death of the insured. The defendant did pay the death benefit payable under the terms of this policy upon the death of the insured, but refused to pay an additional amount of $500 to be paid upon receipt by the defendant of proof that insured sustained bodily injuries through external violence or accidental means, which resulted in the death of the insured.

The question here involved is one of fact. The insured, August G. Bertie, died on January 30, 1932.

The facts are that the plaintiff left her apartment on January 30, 1932, and was absent until about 5:30 o'clock in the afternoon. Upon her return she met her husband, August G. Bertie, George Arthur Taylor, and two other men, sitting in the living room.

Shortly thereafter her husband walked to the bed-room door, after which Mr. Taylor left the apartment and walked into the hallway. The insured, Mr. Radtke, followed Taylor into the hallway. Shortly afterwards three shots were fired, and the plaintiff and the two men in the apartment went out into the hall and found that the insured had been shot and that Mr. Taylor was standing on the stairway with a gun in his hand. He stated, "He isn't going to get me."

There is also evidence that Taylor and the other male companions, together with Radtke, the insured, were in the apartment for several hours. It does not appear from the record that any intoxicating liquors were served and consumed, nor that there were any quarrels between the men. There is evidence tending to show that there had been ill feeling between the insured and Taylor. The record does not disclose that the insured assaulted Taylor, nor that Taylor bore the marks of an assault. The evidence of the witnesses is that within four or five seconds after Taylor and Radtke were near the hallway, shots were heard. No harsh words, vile language, nor a scuffle was heard. Taylor was afterwards indicted and acquitted by a jury upon his trial for this assault. It does seem strange if the insured and Taylor were unfriendly, that during the several hours they were together in the insured's home, there should be no evidence indicating such state of mind of these men.

In the instant case the defendant stresses the point that the insured locked the door to the apartment and refused to unlock the door so that his companions could leave, and the door remained locked until his wife returned home at 5:30 p.m. There

Martin Secretary Jay Spaulding stated to the 911-Com Cop, after which Mr. Taylor left the apartment and walked into the hallway. The Insured, Mr. Hadley, followed Taylor into the hallway. Shortly afterwards loud shots were fired, and the plaintiff and his wife in the apartment went out into the hall and found that the insured had been shot and that Mr. Taylor was standing on the stairway with a gun in his hand. He stated, "He isn't going to get me."

There is also evidence that Taylor and the other male companions, together with Hadley, the insured, were in the apartment for several hours. It does not appear from the record that any intoxicating liquors were served and consumed, nor that there were any quarrels between the men. There is evidence tending to show that there had been ill feeling between the insured and Taylor. The record does not disclose that the insured assaulted Taylor, nor that Taylor bore the marks of an assault. The evidence of the witnesses is that within four or five seconds after Taylor and Hadley were near the hallway, shots were heard. No words, vile language, nor a scuffle was heard. Taylor was afterwards indicted and convicted by a jury upon his trial for this assault. It does seem strange if the insured and Taylor were unfriendly, that during the several hours they were together in the insured's home, there should be no evidence indicating such state of mind of these men.

In the instant case the defendant argues the point that the insured lured the deceased to the apartment not without to which the door to that the commodious south door, and the door remained locked until the wife returned home at 1:30 p.m. There

were no harsh words because of this incident, and none were used in the hallway where the unfortunate occurrence took place.

The evidence indicates that the insured died as a result of violence inflicted by a gun shot fired by Taylor. Why he did this is shrouded in doubt. This lack of proof that the altercation was instigated by insured does not tend to establish that his death resulted from an altercation.

From the facts in this case it does not appear that the defendant came to his death as a result of an assault brought about by his acts. For that reason we believe the court was fully justified in entering the amount of the judgment due under the terms of the policy. The judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

were no harsh words because of this incident, and none were used in the hallway where the unfortunate occurrence took place.

The evidence indicates that the insured died as a result of violence inflicted by a gun shot fired by Taylor. Why he did this is shrouded in doubt. This lack of proof that the altercation was instigated by insured does not tend to establish that his death resulted from an altercation.

From the facts in this case it does not appear that the defendant came to his death as a result of an accident brought about by his acts. The jury reason to believe the court was fully justified in ordering the amount of the judgment due under the terms of the policy. The judgment is affirmed.

CONCURRENT OPINIONS.

Kuhn, J.J., and Green, C. Justices, C. Concur.

38558

CHARLES KRASSEK and ATLAS FISH COMPANY, a corporation,

(Plaintiffs) Appellees,

v.

SAMUEL WAX and LENA WAX, individually and SAMUEL WAX and LENA WAX doing business as SAMUEL WAX FISH COMPANY, and SAMUEL WAX FISH COMPANY, a Corporation,

(Defendants) Appellants.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

283 I.A. 629

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order entered in the Circuit Court of Cook County, on August 22, 1935, directing the issuance of an interlocutory injunction, based upon the plaintiffs' sworn bill of complaint and notice to the defendants. Plaintiffs' bond was approved and filed. This order, omitting the formal part, is as follows:

> "It is ordered that a Writ of Injunction issue herein directed to, and restraining the defendants, Samuel Wax and Lena Wax, and Samuel Wax Fish Company, a corporation, each of them, their agents and servants, from interfering with the business of the Atlas Fish Company.
> They are further enjoined from notifying any creditors or any fishing concerns or fishermen to the effect that no merchandise should be shipped to the plaintiff, Atlas Fish Company, a corporation, and the defendants and each of them are hereby directed to notify all parties that they have previously notified, about not shipping merchandise, to disregard their advice until the further order of court, and to continue to ship merchandise to the Atlas Fish Company, a corporation; and the defendants herein are further enjoined from molesting and threatening the plaintiff, Charles Krassek or any of the agents and servants of the Atlas Fish Company, a corporation.
> And the defendant, Samuel Wax is hereby ordered and directed to continue to sign checks as president of the Atlas Fish Company, to be countersigned by the plaintiff, Charles Krassek, as Vice president, such checks to be disbursed in payment of merchandise for the Atlas Fish Company in the operation of said business until the further order of court."

Thereafter, on August 23, 1935, the plaintiffs obtained leave of court to file an amendment to their bill of complaint, which

Opinion filed Dec. 27, 1935

M. JUSTICE ELDER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order entered in the Circuit Court of Cook County, on August 22, 1935, directing the issuance of an interlocutory injunction, based upon the plaintiffs' sworn bill of complaint and notice to the defendants. Plaintiffs' motions are sustained and filed. This order, omitting the formal part, is as follows:

"It is ordered that a writ of injunction issue herein directed to, and restraining the defendants, Samuel Ain and Sam Ain, and Samuel Ain Company, a corporation, each of them, their agents and servants, from interfering with the business of the Atlas Fish Company.

They are further enjoined from notifying any creditors or any fishing vessels or fishermen in the employ that no merchandise should be shipped to the plaintiff, Atlas Fish Company, a corporation, and the defendants and each of them are hereby directed to notify all parties that they have previously notified, about not shipping merchandise, to disregard their advice until the further order of court, and to continue to ship merchandise to the Atlas Fish Company, a corporation; and the defendants herein are further enjoined from molesting and threatening the plaintiff, Charles Krasnek or any of the agents and servants of the Atlas Fish Company, a corporation.

And the defendant, Samuel Ain is hereby ordered and directed to continue to sign checks as president of the Atlas Fish Company, to be countersigned by the plaintiff, Charles Krasnek, as Vice president, such checks to be disbursed in payment of merchandise for the Atlas Fish Company in the operation of said business until the further order of court."

Thereafter, on August 23, 1935, the plaintiffs obtained leave of court to file an amendment to their bill of complaint, which

is, in substance, that the defendant Samuel Wax, as president of the Atlas Fish Company failed to execute and sign checks so that funds could be withdrawn from the Mid City National Bank of Chicago, for the purpose of paying for merchandise purchased, and all other expenditures which may be necessary in the operation of the business, and the plaintiffs pray that the court direct that all funds now on deposit in the account of the Mid City National Bank be withdrawn by checks to be signed only by Charles Krassek, as vice president of the Atlas Fish Company, the checks to be used for merchandise purchased and to pay for all necessary expenses incurred in the operation of the business. An order was entered as prayed for in the amendment to the bill of complaint. Leave was also granted to make the Mid City National Bank a party defendant in this proceeding.

From the plaintiffs' bill of complaint it appears that Charles Krassek and the Atlas Fish Company, a corporation, are parties plaintiff; that on April 22, 1935, Charles Krassek, became the owner of 50% of the capital stock of 120 shares, and that the defendants are the owners of the balance of the capital stock; that the plaintiff, Charles Krassek, paid $3,000 for said stock. The defendant Samuel Wax is the president, Charles Krassek is the vice president and Lena Wax, wife of said Samuel Wax, is the secretary of the company; that by resolution of April 22, 1935, a deposit of the corporate funds was made in the Mid City National Bank of Chicago, to be withdrawn from the depositary upon the signatures of Samuel Wax as president and Charles Krassek as vice president.

After April 19, 1935, the plaintiff Charles Krassek, continued to devote his entire time and attention to the business of the Atlas Fish Company, which business consists of the buying and selling of fish at 211 North Union Street, Chicago, Illinois; that

is, in substance, that the defendant Samuel Ian, as president of the Atlas Tax Company failed to account and sign checks as his funds could be withdrawn from the City National Bank of Chicago, for the purpose of paying for merchandise purchased, and all other expenditures which may be necessary in the operation of the business, and the plaintiffs say that the most dispute that all funds now on deposit in the account of the City National Bank be withdrawn by checks to be signed only by Charles Ziegler, as vice president of the Atlas Tax Company, the checks to be used for merchandise and to pay for all necessary expenses incurred in the operation of the business. It also was entered as proof for in the amendment to the bill of complaint. Here we also prayed to make the Mid City National Bank a party defendant in this proceeding.

From the plaintiffs' bill of complaint it appears that Charles Ziegler and the Atlas Tax Company, a corporation, are joining plaintiff; that on April 22, 1920, Charles Ziegler, having the money of 90% of the capital stock of the Atlas, and that the defendants are the owners of the balance of the capital stock; that the plaintiff, Charles Ziegler, paid $5,000 for said stock. The defendant Samuel Ian is the president, Charles Ziegler is the vice president and Jane Ian, wife of said Samuel Ian, is the secretary of the company; that by resolution of April 22, 1922, a deposit of the corporate funds was made in the Mid City National Bank of Chicago, to be withdrawn from the depository upon the signature of Samuel Ian as president and Charles Ziegler as vice president.

After April 22, 1922, the plaintiff Charles Ziegler, continued to devote his entire time and attention to the business of the Atlas Tax Company, which consists wholesale of the buying and selling of fish at 211 North Water Street, Chicago, Illinois; that

prior to the purchase of the stock by the plaintiff, Charles Krassek, from the defendant, Samuel Wax, it was orally understood and agreed that both the plaintiff Krassek and the defendant Samuel Wax were to devote their entire time to the operation of the business of the Atlas Fish Company; that after this agreement was made, the plaintiff Krassek, and the defendant Samuel Wax continued to devote their entire time to the business of the Atlas Fish Company, which continued for approximately one month after April 22, 1935, at which time the plaintiffs charge that the defendant Samuel Wax advised the plaintiff Krassek that he was leaving and intended to go to South Chicago, and that the plaintiff could have the business; that the defendant was through. The plaintiff protested and insisted that Samuel Wax carry out the agreement of April 19, 1935, but this the defendant disregarded. He did agree, however, that he would sign, and he did sign as president, a sufficient number of blank checks to be used by the plaintiffs for the purpose of paying creditors of the Atlas Fish Company whatever sums may become due for fish purchased by this company. This arrangement continued until August 12, 1935, during which time the plaintiff, Krassek, continued to control and conduct the business, without the assistance of the defendant, Samuel Wax. The blank checks signed by the defendant Samuel Wax were left in the check book of the Atlas Fish Company, at its place of business, 211 North Union Street, Chicago, and without knowledge of the plaintiffs, someone entered the place of business after business hours and removed from the check book the blank checks signed by the defendant, Samuel Wax, which fact was discovered by the plaintiff on August 13, 1935, when he communicated with the defendant Samuel Wax and ascertained that said checks were in the possession of the defendant Samuel Wax and that he did not intend to permit

prior to the purchase of the stock by the plaintiff, Darlen Krasser, from the defendant, Samuel Sax, it was orally understood and agreed that both the plaintiff Krasser and the defendant Samuel Sax were to devote their entire time to the operation of the business of the Atlas Fish Company; that after this agreement was made, the plaintiff Krasser, and the defendant Samuel Sax continued to devote their entire time to the business of the Atlas Fish Company, which prospered for approximately one month after April 24, 1922, at which time the plaintiff claims that the defendant Samuel Sax induced the plaintiff Krasser that he was leaving and intended to go to South Chicago, and that the plaintiff would have sole business; that the defendant was strong. The plaintiff testified that he thought the party had the agreement of April 19, 1922, but this the defendant disregarded. He did agree, however, that he would sign, and he did sign as president, a sufficient number of blank checks to be used by the plaintiffs for the purpose of paying creditors of the Atlas Fish Company whatever sums may happen are for fish purchased by this company. This arrangement continued until August 11, 1922, during which time the plaintiff, Krasser, continued to control and conduct the business, without the assistance of the defendant, Samuel Sax. The blank checks signed by the defendant Samuel Sax were left in the check book of the Atlas Fish Company, at the place of business, 211 North Union Street, Chicago, and without knowledge of the plaintiff, someone entered the place of business after business hours and removed from the check book the blank checks signed by the defendant, Samuel Sax, which fact was discovered by the plaintiff on August 12, 1922, when he communicated with the defendant Samuel Sax and ascertained that said checks were in the possession of the defendant Samuel Sax and that he did not intend to permit

the plaintiff to continue the operation of the business of the Atlas Fish Company, and this defendant would not permit any checks to be issued on or funds withdrawn from the Mid City National Bank of Chicago. Thereupon the plaintiff Krassek caused a deposit to be made in another bank account and continued in the operation of the business, and thereby became able to pay the creditors of the Atlas Fish Company as merchandise was shipped and received and bills submitted.

This court upon an appeal from an order issuing a temporary injunction will only review and determine from the bill of complaint the question as to whether the bill as filed stated a cause of action, entitling the plaintiffs to the injunction prayed and granted.

It is apparent from the bill of complaint that the defendants committed acts in violation of the agreement of the parties for the purpose of destroying the business of the plaintiffs. The rule is well established and needs no citation of authorities, that an interlocutory injunction in a proper case is issued only for the purpose of maintaining the status quo between the parties until the merits of the allegations can be determined.

The facts alleged and charged in the bill of complaint are that after the defendants abandoned the business they conspired to divert not only the business of the Atlas Fish Company, but also the funds which were in the hands of the Company, to the business of the defendants, who since the abandonment have been engaged in a similar business.

The defendants contend that a part of the order is mandatory in character and therefore erroneous. To warrant the issuance of a mandatory injunction solely on the basis of the sworn bill of complaint, the plaintiff must make out a clear case, free from doubt

the plaintiff to continue the operation of the business of the Atlas Fish Company, and this defendant would not permit any checks to be issued to or funds withdrawn from the bank by plaintiff save at pleasure. Therefore the plaintiff brought suit to recover $3 to be made in another bank account and continued in the operation of the business, and thereby became able to pay the creditors of the Atlas Fish Company as aforesaid was shipped and received and bills submitted.

This court upon an appeal from an order issuing a temporary injunction will only review and determine from the bill of complaint the question as to whether the bill as filed stated a cause of action, entitling the plaintiffs to the injunction prayed and granted.

It is apparent from the bill of complaint that the defendants admitted data in violation of the agreement of the parties for the purpose of disturbing the business of the plaintiffs. The rule is well established and needs no citation of authorities, that an interlocutory injunction in a proper case is issued only for the purpose of maintaining the status quo between the parties until the merits of the allegations can be determined.

The facts alleged and charged in the bill of complaint are that after the defendants abandoned the business they conspired to divert not only the business of the Atlas Fish Company, but also the funds which were in the hands of the Company, to the business of the defendants, who since the abandonment have been engaged in a similar business.

The defendants contend this a part of the order is mandatory in character and therefore erroneous. To warrant the issuance of a mandatory injunction solely on the basis of the sworn bill of complaint, the plaintiff must make out a clear case, free from doubt

or dispute, and then the court will grant such order only in case of extreme urgency. This court is warranted in applying the rule of law to that part of the order which is not preventive, but mandatory, in that it directs the defendants to notify all parties that they have previously notified about not shipping merchandise, to disregard their advice until the further order of court, and to continue to ship merchandise to the Atlas Fish Company; and further directs that Samuel Wax is to continue to sign checks as president of the Atlas Fish Company, to be disbursed in payment of merchandise of this defendant company. This order is not justified by any facts alleged in the bill of complaint. Cleaning, etc. Assn. v. Sterling Cleaners & Dyers, 278 Ill. App. 70. We believe that part of the order directing the defendants to act before they have had an opportunity to make a defense to this question, is erroneous, and should be reversed; and that in all other respects the order should be affirmed. Ch. 110, par. 206, sec. 78 of the Practice Act provides, in part, as follows:

> "Upon such appeal the Appellate Court may affirm, modify, or reverse such interlocutory order or decree, and shall direct such proceedings to be had in the court below as the justice of the case may require."

As we have indicated, the order for an interlocutory injunction is affirmed as to that part of the injunctional order restraining the defendants and each of them from interfering with the business of the Atlas Fish Company. As to the part of the order that is mandatory in character, the order is reversed.

INTERLOCUTORY ORDER AFFIRMED IN PART AND REVERSED IN PART.

HALL, P. J. AND DENIS E. SULLIVAN, J. CONCUR.

or dispute, and then the court will grant such order only in case of extreme urgency. This court is warranted in applying the rule of law to that part of the order which is not preventive, but mandatory, in that it directs the defendants to notify all parties that they have previously notified about not shipping merchandise, to discharge their advice until the further order of court, and to continue to ship merchandise to the Atlas Plan Company; and further directs that Samuel Max is to continue to sign checks as president of the Atlas Plan Company, to be disbursed in payment of merchandise of this defendant company. This order is not justified by any facts alleged in the bill of complaint. Lessnian, etc. Co. v. Sterling Clothers & Dyers, 278 Ill. App. 70. We believe that part of the order directing the defendants to ship goods they have had an opportunity to make a defense to this question, is erroneous, and should be reversed; and that in all other respects the order should be affirmed. Ch. 110, par. 208, sec. 78 of the Practice Act provides, in part, as follows:

> "Upon such appeal the Appellate Court may affirm, modify, or reverse such interlocutory order or decree, and shall direct such proceedings to be had in the court below as the justice of the case may require."

As we have indicated, the order for an interlocutory injunction is affirmed as to that part of the injunctional order restraining the defendants and each of them from interfering with the business of the Atlas Plan Company. A 2 is the part of the order that is mandatory in character, the order is reversed.

INTERLOCUTORY ORDER AFFIRMED IN PART AND REVERSED IN PART.

HALL, P. J. AND DENIS E. SULLIVAN, J. CONCUR.

37965

EMILY BUDEK, Administratrix, de bonis non of the Estate of Joseph Budek, Deceased,
Defendant in Error,

v.

CITY OF CHICAGO, a municipal corporation,
Plaintiff in Error.

ERROR TO

SUPERIOR COURT

COOK COUNTY.

283 I.A. 630

Opinion filed Dec. 27, 1935

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error issued to review the judgment of the Superior Court in an action for trespass on the case brought by Emily Budek, as administratrix de bonis non of the estate of Joseph Budek, deceased, against the City of Chicago, a municipal corporation, defendant, to recover damages for personal injuries sustained by the said Joseph Budek, her husband, which caused his death.

The declaration sets forth that the plaintiff and others were riding as passengers in a southbound automobile in Western avenue, between 76th and 77th streets in the City of Chicago, on the night of February 15, 1931, at about 7:30 o'clock. The defendant, City of Chicago, had been repairing the street at this point and as the automobile, containing the plaintiff and her husband, Joseph Budek, was being driven by one Fred Swiss, it came upon a section of the street which had been dug up by the defendant for the purposes of repair; that when the automobile struck this rough, uneven and depressed portion of the street, the driver of the automobile lost control of the automobile which ran up upon the street car tracks on said street and was struck by a street car which was coming at a high rate of speed and all of the occupants in said automobile were injured, four of them dying as a result thereof.

It is claimed and the evidence shows that for several

Opinion filed Dec. 27, 1933

Mr. JUSTICE DUFFY E. McGILLIGAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error issued to review the judgment of the Superior Court in an action for trespass on the case brought by Sally Hudek, as administratrix de bonis non of the estate of Joseph Hudek, deceased, against the City of Chicago, a municipal corporation, defendant, to recover damages for personal injuries sustained by the said Joseph Hudek, her husband, which caused his death.

The declaration sets forth that the plaintiff and others were riding in passengers in a motorized automobile in Western avenue, between 79th and 77th streets in the city of Chicago, on the night of February 13, 1931, at about 7:30 o'clock. The defendant, City of Chicago, had been repairing the street at this point and as the automobile, containing the plaintiff and her husband, Joseph Hudek, was being driven by one Fred Deine, it came upon a section of the street which had been dug up by the defendant for the purpose of repair; that upon the unpaved street this rough, uneven and depressed portion of the street, the driver of the automobile lost control of the automobile which ran up upon the street car tracks on said street and was struck by a street car which was coming at a high rate of speed and all of the occupants in said automobile were injured, four of them dying as a result thereof.

It is claimed and the evidence shows that for several

nights no lights had been put upon the barricades surrounding that portion of the street which was being repaired and that Joseph Budek, since deceased, and the plaintiff who were husband and wife, were sitting in the back seat of the car which was traveling at the rate of from 32 to 35 miles an hour. Several claims for injuries as a result of this accident have been before this court, wherein most of the questions both as to the facts and the law have been raised and have been passed upon by this court. In the case of Lawrence Ahrens v. City of Chicago, Appellate Court No. 37332, which was a suit growing out of the same accident, it was therein stated that the plaintiff in the instant case and her husband, the deceased, were occupying the rear seat of the car and she was sitting in his lap. It was claimed by counsel for defendant, in the oral argument before this court, that they had a new point in this case that had not been decided in the other two cases on the question of contributory negligence, namely, that the driver of the car in which the plaintiff and her intestate were riding was racing, and, consequently, was guilty of contributory negligence which would prevent plaintiff herein from recovery. To support this contention of defendant, there was produced at the trial a man and his wife, William Miller and Margaret Miller, who testified that they were driving south on Western avenue at 63rd street and that they rode abreast of this automobile up to the place of the accident; that plaintiffs were riding along parallel to the car driven by the witness Miller. Miller stated: "The car attempted to pace me". In another place he used the expression, "I noticed that he was endeavoring to pass me up * * * I was going about thirty-five miles an hour." He stated that the other car was full of people who seemed to be enjoying themselves; that he was in the lead and going about 35 miles an hour.

subject to liability had been not upon the probabilities surrounding that portion of the street which was being repaired and that jumping ditch, alone dangerous, and the plaintiff who were laboring and with, only sitting in the back seat of the car which was travelling at the rate of from 30 to 35 miles an hour. Counsel claims for injuries as a result of this accident were taken within this county, namely, most of the treatments such as by the Dr. Ian have been issued and have been passed upon by this court. In the case of Lawrence County v. City of Bedford, decided Jan. 5th, 1926, which was a suit against out of the same accident, it was therein stated that the plaintiff in the instant case and her husband, the deceased, were occupying the rear seat of the car and she was sitting in his lap. It was claimed by counsel for defendant, in the oral argument before this court, that they had a new point in this case that had not been decided in the other two cases on the question of contributory negligence, namely, that the sister of the car in which the plaintiff and her husband were riding was driving, and, consequently, was guilty of contributory negligence which would prevent plaintiff herein from recovery. To support this contention of defendant, there was produced as the trial a man and his wife, William Miller and Mrs. Miller, who testified that they were driving south on Bedford avenue at 52nd street and that they made observation of this automobile up to the place of the accident; that plaintiffs were riding along parallel to the car driven by the witness Miller. Miller stated: "The car attempted to pass me". In another place he used the expression, "I noticed that he was endeavoring to pass me up * * * I was going about thirty-five miles an hour." He stated that the other car was full of people who seemed to be enjoying themselves; that he was in the lead and going about 35 miles an hour.

He further stated that "we were obeying the law and driving along at what I considered a reasonable speed for that kind of neighborhood." He further stated, "I don't remember whether there was barricades and lights there in the street or not."

In the former case that was before this court, Case No. 37323, Emily Budek, Defendant in Error v. City of Chicago, Plaintiff in Error, Mr. Justice John J. Sullivan in his opinion, said:

> "There is not a scintilla of evidence that the driver of the automobile was driving recklessly or at an excessive rate of speed. Nor is there a scintilla of evidence that the driver of the automobile or any of its occupants was drunk or crazy or had even a single drink of intoxicating liquor, notwithstanding that it was argued to the jury by defendant's counsel that one and all of them were or must have been drunk or crazy, and, notwithstanding that the same argument is persisted in on this appeal."

We find that even the evidence produced by the witness William Miller for the defendant, stated that they were obeying the law and driving along at what he considered a reasonable speed.

Defendant's argument consisted principally of stating abstract propositions of law and it has recited cases which have no application to the facts in this case. Counsel states in its argument:

> " * * * it must affirmatively appear somewhere in the trial that both the decedent and his wife riding with him and sitting on his lap were in the exercise of ordinary care for his safety at and before the time of the accident which resulted in his death."

The evidence shows that Joseph Budek was sitting in the rear seat and his own wife was sitting on his lap. He had nothing to do with the operation of the car which, according to the witness for the defendant, was being operated at a lawful rate of speed. Nothing happened until the driver of the car came upon the hole in the street, unguarded and unlighted. Just what further evidence would be necessary in order to show that the plaintiff and plaintiff's intestate were in the exercise of due care for

He further stated that "we were obeying the law and driving along at what I considered a reasonable speed for that kind of neighborhood." He further stated, "I don't remember whether there was barricades and lights there in the street or not."

In the former case that was before this court, June 6, 1938, Mullin Petty, defendant in error v. Ellis et Ux., 184 Ga. 217 in error, Mr. Justice John G. Sullivan in his opinion, said:

> "There is not a scintilla of evidence that the driver of the automobile was driving recklessly or at an excessive rate of speed. Nor is there a scintilla of evidence that the driver of the automobile or any of its occupants was drunk or every he had ever a single drink of intoxicating liquor, notwithstanding that it was argued to the jury by defendant's counsel that one and all of them were or must have been drunk or crazy, and, notwithstanding that the same argument is permitted in on this appeal."

We find that even the evidence produced by the witness William Miller for the defendant, stated that they were obeying the law and driving along at what he considered a reasonable speed.

Defendant's argument consisted principally of stating abstract propositions of law and it has recited cases which have no application to the facts in this case. Counsel states in its argument:

> " * * * In more attractively worded sentences he the trial that both the deceased and his wife riding with him and sitting on his lap were in the exercise of ordinary care for his safety at and before the time of the accident which resulted in his death."

The evidence shows that Joseph Rudek was sitting in the rear seat and his own wife was sitting on his lap. He had nothing to do with the operation of the car which, according to the witness for the defendant, was being operated at a lawful rate of speed. Nothing happened until the driver of the car saw the hole in the street, unguarded and unlighted. Just what further evidence would be necessary in order to show that the plaintiff and plaintiff's intestate were in the exercise of due care for

their own safety, we fail to see. The question of what is the exercise of ordinary care, is a question for the jury, where there is any evidence from which such care can be inferred. In this case even defendant's own witnesses testified that the car was not racing, but running at a lawful rate of speed.

In the case of Lawrence Ahrens, Defendant in Error v. City of Chicago, Plaintiff in Error, Appellate Court No. 37328, which was one of the other cases growing out of this accident, this court said:

> "There is no evidence that plaintiff was not in the exercise of ordinary care for his safety. He was sitting in the rear seat and it was reasonable to believe that he could not see the condition of the street until the automobile had entered upon the excavation strip."

In the case of Emily Budek, Defendant in Error v. City of Chicago, Plaintiff in Error, supra, this court further held:

> "There is no evidence that plaintiff was not in the exercise of ordinary care for her safety. She was sitting on the lap of her husband on the right rear seat, and it was reasonable to believe that she could not see the condition of the street until the automobile had entered upon the excavation strip. * * * If the driver of the car was exercising due care, and there was ample evidence to justify the jury in so finding, then undoubtedly it would be a fair inference that plaintiff as a passenger in the rear seat was in the exercise of due care. (St. Clair Nat. Bk. of Belleville v. Monaghan, 256 Ill. App. 471.) There is no evidence that even tends to show that the driver of the automobile was not in the exercise of reasonable care for the safety of himself and his passengers."

Complaint is made by defendant to some of the instructions given at the request of the plaintiff. Some of these instructions were passed upon by this court in the prior cases and approved as being applicable to the facts and we cannot see the necessity in again bringing them up in this case. For instance, instruction No. 10 was complained of. In Budek v. City of Chicago, supra, this court said concerning this instruction and several other instructions:

> "However, it is insisted that a similar instruction was condemned in the case of Opp v. Pryor, 294 Ill. 538. In

their own safety, we fail to see. The question of what is the exercise of ordinary care, is a question for the jury, where there is any evidence from which such case can be inferred. In this case even defendant's own witnesses testified that the car was not moving, but running at a lawful rate of speed.

In the case of Lawrence Sprague, defendant in Error v. City of Chicago, Plaintiff in Error, appellee herein in. Court, which was one of the other cases growing out of this accident, this court said:

> "There is no evidence that plaintiff was not in the exercise of ordinary care for his safety. He was sitting in the jury box and it was reasonable to believe that he would not see the conditions of the street until the automobile had entered upon the crossing. * * * If the driver of the car was exercising due care, and there was ample evidence to justify the jury in so finding, then undoubtedly it would be a fair inference that plaintiff as a passenger in the rear seat was in the exercise of due care. (Ill. Cent. Rd. Co. of Illinois v. Hawkins, 206 Ill. 197, 199.) There is no evidence that even tends to show that the driver or the automobile was not in the exercise of reasonable care for the safety of himself and his passengers."

Complaint is made by defendant to some of the instructions given at the request of the plaintiff. Some of these instructions were passed upon by this court in the prior cases and approved as being applicable to the facts and we cannot see the necessity in again bringing them up in this case. For instance, instruction No. 10 was complained of. In Dunkel v. City of Chicago, supra, this court said concerning this instruction and several other instructions:

> "However, it is insisted that a similar instruction was condemned in the case of Dun v. Lyon, 288 Ill. 328. In

that case the plaintiff was riding in the right-hand front seat of an automobile approaching a railroad crossing which was well lighted, and a train was backing over the crossing from plaintiff's right, so that she was nearer to it than the driver of the car. On this train were several members of the train crew with lighted lanterns, which were observed by other witnesses at a distance considerably farther from the crossing than plaintiff. In the Opp case the court said at pages 547, 548:

"' It was essential for the plaintiff to prove that she was in the exercise of ordinary care for her own safety in approaching and going upon the crossing and she was not relieved from that duty because she was riding in an automobile. If she exercised such care any negligence of Ethel Shambaugh could not be imputed to her, but she would be responsible for her own negligence. The plaintiff sat at the right of the driver in front, with at least equal opportunity to observe danger and the approach of the train, and being bound to prove the exercise of ordinary care by herself, it was no less her duty than that of the driver to observe and avoid danger, if practicable, and to warn the driver. (Flynn v. Chicago City Railway Co., 250 Ill. 460; Pienta v. Chicago City Railway Co. 284 id. 246). * * * If Ethel Shambaugh was not guilty of any negligence in driving the car and could not see or hear anything to indicate the approach of the train, it would, perhaps, be a fair inference that the plaintiff could not, but the instruction was inconsistent and contradictory in substantially telling the jury that although Ethel Shambaugh did not exercise ordinary care for the safety of those in the automobile yet the plaintiff might have been in the exercise of such care herself, without the slightest evidence that she did anything at all. As a general rule one who has no control or authority over another is not responsible for the negligence of the other, but instructions should be given as an aid to the jury in deciding the case, and in view of the evidence this instruction was wrong.'

"That case recognized the general rule that a passenger in an automobile, who is in the exercise of proper care, is not responsible for or chargeable with the negligence of the driver over whom he has no control, but held that a somewhat similar instruction was inconsistent and contradictory because, under the evidence in that case, facts conveying knowledge of the danger were at hand and were as readily available to plaintiff as to the driver. The facts there are not comparable with the facts in this cause, and the reasons advanced for condemning the instruction there are neither applicable nor controlling here. Certainly no duty devolved upon plaintiff to warn the driver of a danger of which she has no knowledge nor of which in the exercise of due care she could have learned in time to warn him to avoid it.

"We think plaintiff's instruction No. 6 contained a correct statement of law applicable to the facts of this case. Under the facts in the record it was clearly a question of fact for the jury to determine whether or not both plaintiff and the driver of the car were exercising

due care at and prior to the accident. If the driver of the car was exercising due care, and there was ample evidence to justify the jury in so finding, then undoubtedly it would be a fair inference that plaintiff as a passenger in the rear seat was in the exercise of due care. (St. Clair Nat. Bk. of Belleville v. Monaghan, 256 Ill. App. 471). There is no evidence that even tends to show that the driver of the automobile was not in the exercise of reasonable care for the safety of himself and his passengers."

We have examined the balance of the instructions in which it is claimed that the court committed error, but we fail to find that they did not correctly state the law as applicable to the facts as produced at the hearing.

Counsel for defendant further complains of the conduct of the court in the trial of this case. We have examined the abstract of the evidence and we fail to find that the court did other than attempt to control two zealous lawyers and keep error from the record. In the trial of a law suit, a judge has something to do other than automatically rule upon the admissibility of evidence. It is his duty to see that a fair trial is had by both sides and, in doing this, he may administer admonitions and place strictures upon unruly counsel that they may not like or which touch their sensibilities. We fail to see in this case that the trial court did other than to rule fairly and conduct the trial in a seemly manner and at times under trying circumstances. No error was committed by the trial judge in doing this.

For the reasons herein given, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

due care is not under is the instant. If the driver of the car was exercising the care, and there was ample evidence to justify the jury in so finding, then subsequently it would be a fair inference that identical as a proximate in the fact also is the proximate of the case. Cit. Cent. Ga. of Intermediate v. Bennett, 124 Ga. 1111. Taken in an evidence that were issue in case that the driver of the automobile was not in the exercise of reasonable care for the safety of himself and the passengers.

We have examined the balance of the instructions in which it is claimed that the court committed error, but we fail to find that they did not correctly state the law as applicable to the facts as presented at the hearing.

Counsel for interested further complaint of the conduct of the judge in the trial of this case. We have examined the abstract of the evidence and we fail to find that the court did other than attempt to control the zealous lawyers and keep error from the record. In the trial of a law suit, a judge has something to do other than automatically rule upon the admissibility of evidence. It is his duty to see that a fair trial is had by both sides and, in doing this, he may administer admonitions and place criticisms upon erroneously remarks that they may take or wrong touch their sensibilities. We fail to see in this case that the trial court did other than to rule fairly and conduct the trial in a ready manner and at times under trying circumstances. No error was committed by the trial judge in doing this.

For the reasons herein given, the judgment of the Superior Court is AFFIRMED.

EXCEPTIONS AFFIRMED.

BELL, P.J., AND BELL, J., CONCUR.

37974 Opinion filed Dec. 27, 1935

VINEY BANKS, etc., et al,
(Plaintiffs) Appellants,
v.
S. A. T. WATKINS, et al,
(Defendants) Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

283 I.A. 630

ON REHEARING.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court dismissing the above suit as to S. A. T. Watkins, one of the defendants. The plaintiff Viney Banks, as administratrix of the estate of Estelle Reddick, deceased, commenced suit on April 16, 1930, against Mittie M. Watkins and Teddy Stevens, alleging that on October 15, 1929, the plaintiff's intestate whilst crossing the street at the east intersection of East 48th street and South Parkway was struck by an automobile owned and operated by the defendants Mittie M. Watkins and Teddy Stevens and as a result of her injuries she died on the same day whilst being taken to the hospital. No service was had upon the defendant Teddy Stevens.

Mittie M. Watkins filed two pleas to the declaration. The first plea was that of the general issue and the second plea was that the defendant did not own, control, possess, operate, drive or run the automobile or motor vehicle alleged to have caused the injury resulting in the death of the deceased.

On August 31, 1932, on motion of plaintiff the suit was dismissed as to the defendant Stevens. On April 9, 1934, the suit was dismissed by the court for want of prosecution and on April 25, 1934, the said order of dismissal was vacated and set aside. On June 6, 1934, a summons was issued against the defendant S. A. T. Watkins and served upon him. On June 5, 1934, an order was entered on the motion of plaintiff asking leave to amend all

VIRGY BAKER, etc., et al., (Plaintiffs) Appellees, v. G. E. T. WEBSTER, et al., (Defendants) Appellees.	APPEAL FROM SANGAMON COUNTY.

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court dismissing the above suit as to G. E. T. Webster, one of the defendants. The plaintiff Virgy Baker, as administratrix of the estate of Leslie Baker, deceased, commenced suit on April 24, 1933, against Willie E. Webster and Tedy Stevens, alleging that on October 12, 1932, the plaintiff's intestate while crossing the street at the east intersection of East 46th street and South Parkway was struck by an automobile owned and operated by the defendants Willie E. Webster and Tedy Stevens and as a result of the injuries she died on the same day while being taken to the hospital. No service was had upon the defendant Tedy Stevens.

Willie E. Webster filed two pleas to the declaration. The first plea was that of the general issue and the second plea was that the defendant did not own, control, possess, operate, drive or run the automobile or motor vehicle alleged to have caused the injury resulting in the death of the deceased.

On August 22, 1933, on motion of plaintiff the suit was dismissed as to the defendant Stevens. On April 2, 1934, the suit was dismissed by the court for want of prosecution and on April 26, 1934, the said order of dismissal was vacated and set aside. On June 6, 1934, a summons was issued against the defendant T. A. T. Webster and served upon him. On June 8, 1934, an order was entered on the motion of plaintiff giving leave to amend all

pleadings in the said cause by striking the words "Mittie M" and inserting "S.A.T." in lieu thereof. Thereafter, on June 6, 1934, on petition of plaintiff leave was had to make the said Teddy Stevens again a party defendant, by vacating the order of dismissal theretofore had against the said Stevens and that a summons be issued returnable to the July term.

The cause on motion of plaintiff was set for trial on April 25, 1934. Thereafter on the 6th day of June, 1934, a summons was issued on motion of plaintiff for the defendant here, S. A. T. Watkins, and on the same date leave was granted to insert the name "S.A.T." for"Mittie M." Watkins.

On July 2, 1934, the defendant S. A. T. Watkins entered his appearance and on July 5, 1934, thereafter filed two pleas; one of the general issue and the second alleging that the suit was not commenced within one year from the date of the death, as provided by statute.

Thereafter, on September 21, 1934, on motion of plaintiff an order was entered on plaintiff's motion that defendant's second plea, namely, failure to bring suit within one year from the date of the death, was stricken. On October 3, 1934, on motion of plaintiff to strike the second plea of the defendant S. A. T. Watkins, the motion was denied, from which ruling by the court the plaintiff asked leave to appeal to this court. Said appeal was allowed upon plaintiff's furnishing a bond for $200 in 30 days and a bill of exceptions in 60 days. These confusing and erroneous orders are not explained in either brief filed here.

Thereafter, on October 11, 1934, pursuant to notice, the defendant S. A. T. Watkins appeared by petition and moved the court to dismiss the above entitled cause as to him for the reason that the suit was not commenced under the provisions of the statute,

pleading in the said cause by striking the words "Little M" and inserting "a.A.T." in lieu thereof. Thereafter, on June 6, 1964, on petition of plaintiff leave was had to make the said July [illegible] amend a prior pleading, by striking the words of [illegible] therefore had against the said Jerome and thus a judgment be issued returnable to the July term.

The cause on motion of plaintiff was set for trial on April 28, 1964. Thereafter on the 6th day of June, 1964, a judgment was issued on motion of plaintiff for the defendant Arve, i. A. T. [illegible], but on the same date leave was granted to insert the name "a.A.T." [illegible] [illegible].

On July 2, 1964, the defendant E. A. T. Tobine entered his appearance and on July 7, 1964, Lawrence Ziant the plaintiff of the general issue and his pleaded alleging that the suit was not commenced within one year from the date of the death, as provided by statute.

Thereafter, on September 11, 1964, on motion of plaintiff an order was entered on plaintiff's motion that defendant's second plea, namely, failure to bring suit within one year from the date of the death, was stricken. On October 2, 1964, on motion of plaintiff to strike the second plea of the defendant E. A. T. Tobine, the motion was denied, from which ruling by the court the plaintiff asked leave to appeal to this court. Said appeal was allowed upon plaintiff's furnishing a bond for $200 in 30 days and a bill of exceptions in 60 days. These conditions and stipulations are not established in either brief filed here.

Thereafter, on October 12, 1964, upon notice to the defendant E. A. T. Tobine accepted by [illegible] and moved the court to dismiss the above entitled cause on the ground that the suit was not commenced under the provisions of the statute,

which provides that such suit must be commenced within one year from the date of the death of the deceased. He further set forth in the affidavit that the suit was originally instituted by the plaintiff against Teddy Stevens and Mittie M. Watkins on April 16, 1930, and a summons was served upon Mittie M. Watkins and she filed her appearance and filed pleas to the declaration; that subsequent thereto the defendant Teddy Stevens was dismissed out of the suit, leaving as the sole defendant Mittie M. Watkins; that on June 5, 1934, on motion of the plaintiff an order was entered that the pleadings be amended on their face by striking out the words "Mittie M."and inserting the letters "S.A.T."; that thereupon a summons was issued dated June 5, 1934 and served upon him; that it is alleged in the declaration that on October 15, 1929, plaintiff's intestate died as the result of the injuries sustained; that five years had elapsed since said death and that the suit was brought under the provisions of the statute providing that the same must be commenced against the defendant within one year as a condition of liability.

On October 11, 1934, the court entered an order dismissing the suit as to the said S. A. T. Watkins, on which order there appears this notation.

> "To the entry of this order the defendant excepts and prays an appeal Bond $200 in 30 days bill except in 60 days."

These facts, so far as we can obtain them, are the result of a laborious investigation of an incomplete record and abstract which are not arranged in chronological order.

It is claimed by the plaintiff that the court was not justified in dismissing the suit without a hearing on the merits. In the case of Hartray v. Chicago Railways Co., 290 Ill. 85, at page 86, the court said:

which provides that such suit must be commenced within one year from the date of the death of the deceased. He further set forth in the affidavit that the suit was originally instituted by the plaintiff against Teddy Stevens and Willie E. Watkins on April 16, 1924, and a summons was served upon Willie E. Watkins and she filed her appearance and filed plea to the declaration; that subsequent thereto the defendant Teddy Stevens was dismissed out of the suit, leaving as the sole defendant Willie E. Watkins; that on June 5, 1924, on motion of the plaintiff an order was entered that the pleadings be amended on their face by striking out the words "Willie E." and inserting the letters "S.A.T."; that thereupon a summons was issued dated June 5, 1924 and served upon him; that it is alleged in the declaration that on October 15, 1922, plaintiff's intestate died as the result of the injuries sustained; that five years had elapsed since said death and that the suit was brought under the provisions of the statute providing that the same must be commenced against the defendant within one year as a condition of liability.

On October 11, 1924, the court entered an order dismissing the suit as to the said S. A. T. Watkins, on which order there appears this notation.

"To the entry of this order the defendant excepts and prays an appeal bond (200) in 30 days bill exceptions in 60 days."

These facts, so far as we can obtain them, are the result of a laborious investigation of an incomplete record and abstract which are not arranged in chronological order.

It is claimed by the plaintiff that the court was not justified in dismissing the suit without a hearing on the merits. In the case of Kettler v. Chicago Railways Co., 290 Ill. 82, at page 82, the court said:

"This suit was brought under the Injuries act, and the time fixed for commencing an action arising under that act is a condition of the liability and operates as a limitation of the liability itself and not of the remedy, alone. (Carlin v. Peerless Gas Light Co., 283 Ill. 142; Goldstein v. Chicago City Railway Co. 286 id. 297.) Since the right of action for death by wrongful act is wholly statutory and must be taken with all the conditions imposed upon it, the burden being upon plaintiff to bring himself within the requirements of the statute, it is almost universally held that a provision in the statute creating the right, requiring an action thereon to be brought within a specified time, is more than an ordinary statute of limitations and goes to the existence of the right itself. It is a condition attached to the right to sue at all. * * * It is a condition precedent to the right of recovery granted by this act that the action be brought within one year after the cause of action accrues. * * * In a statutory action like this, where the right is conditional, the plaintiff must bring himself clearly within the prescribed requirements necessary to confer the right of action. * * * Inasmuch, therefore, as the limitation of the time in which to sue is considered not merely of the remedy but of the right of action itself and the cause of action exists subject to the limitation, a declaration must allege or state facts showing that the action is brought within the time prescribed by the statute. (Goldstein v. Chicago City Railway Co. supra; Chandler v. Chicago and Alton Railway Co. 251 Mo. 592; Gulledge v. Seaboard Air Line, 147 N. C. 234.)"

It is contended on behalf of the plaintiff that section 39 of the Practice Act was changed by amendment on June 26, 1929, by adding the following clause:

"Any amendment to any pleading shall be held to relate back to the date of filing the original pleading so amended; and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed."

This section of the statute has been previously before this court.

In the case of Redmond v. Schlithelm, 273 Ill. App. 222, the facts in that case were somewhat similar to the case at bar, and were as follows: June 27, 1929, plaintiff, administratrix, began an action on the case against one John Schlithelm. November 13, 1930, on plaintiff's motion, Jacob Schilthelm was made an additional defendant and alleged that the action was not commenced against defendant until the filing of the amended declaration on

"This suit was brought under the Jurdens act, and the plaintiff has accordingly an action arising under that act in a condition of the liability and operates as a limitation of the liability itself and not of the remedy, alone. (Durkin v. Fairview Gas Light Co., 221 Ill. 148; Goldberg v. Illinois City Railway Co., 188 Ill. 177.) Since the right of action for death by wrongful act is wholly statutory and must be taken with all the conditions imposed upon it, the section being some plaintiff is being already within the requirements of the statute. It is almost unnecessary said that a provision in the statute creating the right, requiring an action therein to be brought within a specified time, is more than an ordinary statute of limitations and goes to the existence of the right itself. It is a condition annexed to the right as one at all. " " " It is a condition precedent to the right of recovery created by this act that the action be brought within one year after the cause of action accrues. " " " In a statutory action like this, where the right is conditional, the plaintiff must bring himself clearly within the prescribed requirements necessary to confer the right of action. " " " Therefore, as the limitation of the time in which to sue is conditional and merely of the remedy but of the right of action itself and the cause of action which was lost by the limitation, a declaration sans allege or state facts showing that the action is brought within the time prescribed by the statute. Goldstein v. Chicago City Railway Co., supra; Chandler v. Chicago and Alton Railway Co., 221 Ill. 148; Goldberg v. Illinois Air Line, 187 N. O. 224."

It is contended on behalf of the plaintiff that section

12 of the Practice Act was changed by amendment on June 28, 1920,

by adding the following clause:

"Any amendment to any pleading shall be held to relate back to the date of filing the original pleading as amended; and the cause of action or defense set up in said amended pleading shall not be barred by laches, or lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed."

This section of the statute has been previously before this court.

In the case of Lagerund v. Lehigheld, 271 Ill. App. 322, the facts in that case were somewhat similar to the case at bar, that were as follows: The P, INTE, plaintiff, administrator, began an action on the case against one John Schlichting. November 12, 1920, on plaintiff's motion, Jacob Schlichting was made an additional defendant and alleged that the action was not commenced against defendant until the filing of the amended declaration on

November 15, 1930, more than one year after the death of the intestate. As to this last plea plaintiff replied that she ought not to be barred by reason of section 39, Chapter 110 of the Illinois Revised Statutes, 1933. A demurrer to this replication was sustained, and plaintiff electing to abide by her replication, judgment was entered for defendants. Mr. Justice Matchett, speaking for the court, said:

> "The theory for which plaintiff contends would practically eliminate the provision and limitation of the statute; and that, clearly, was not the intention of the legislature. The statute upon which plaintiff's suit is based 'is more than an ordinary statute of limitations and goes to the right to sue at all.' Hartray v. Chicago Rys. Co., 290 Ill. 85.
>
> No case construing this section of the statute sustains the construction for which plaintiff contends. Townsend v. Postal Benefit Ass'n. 262 Ill. App. 483; Pfeffer v. Farmers State Bank of Schaumburg, 263 Ill. App. 360; Bandet v. Burns, 266 Ill. App. 382."

In the instant case, as previously stated, suit was commenced against this defendant practically five years after the death of plaintiff's intestate. The trial court was right in overruling the demurrer to this plea.

It is next contended by the plaintiff that the court erred in dismissing the suit as to the defendant and asked this court to reverse the same for a trial upon the merits. We fail to see the advantage which would result to plaintiff by a reversal of the decision of the trial court. The purpose of the new Practice Act, as we understand it, is to save time and expense in court procedure in permitting the court to do at the earliest time possible what would be the inevitable and final result. Chapter 110, Section 173, Illinois Revised Statutes, 1935, provides:

> "Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient.

It is contended on behalf of the plaintiff that section 19 of the Practice Act was changed by amendment on June 26, 1890, by adding the following clause:

> "Any amendment to any pleading shall be held to relate back to the date of filing the original pleading so amended; and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed."

This section of the statute has been previously before this court. In the case of Hodgson v. Hohlfeld, 177 Ill. App. 466, the facts in that case were somewhat similar to the case at bar, and were as follows: June 27, 1904, plaintiff, administrator, began an action on the case against one John Hohlfeld. November 17, 1906, on plaintiff's motion, Jacob Hohlfeld was made an additional defendant and alleged that the action was not commenced against defendant until the filing of the amended declaration on

November 15, 1930, more than one year after the death of the intestate. As to this last plea plaintiff replied that she ought not to be barred by reason of section 39, Chapter 110 of the Illinois Revised Statutes, 1933. A demurrer to this replication was sustained, and plaintiff electing to abide by her replication, judgment was entered for defendants. Mr. Justice Matchett, speaking for the court, said:

> "The theory for which plaintiff contends would practically eliminate the provision and limitation of the statute; and that, clearly, was not the intention of the legislature. The statute upon which plaintiff's suit is based 'is more than an ordinary statute of limitations and goes to the right to sue at all.' Hartray v. Chicago Rys. Co., 290 Ill. 85.
>
> No case construing this section of the statute sustains the construction for which plaintiff contends. Townsend v. Postal Benefit Ass'n, 262 Ill. App. 483; Pfeffer v. Farmers State Bank of Schaumburg, 263 Ill. App. 360; Bandet v. Burns, 266 Ill. App. 382."

In the instant case, as previously stated, suit was commenced against this defendant practically five years after the death of plaintiff's intestate. The trial court was right in overruling the demurrer to this plea.

It is next contended by the plaintiff that the court erred in dismissing the suit as to the defendant and asked this court to reverse the same for a trial upon the merits. We fail to see the advantage which would result to plaintiff by a reversal of the decision of the trial court. The purpose of the new Practice Act, as we understand it, is to save time and expense in court procedure in permitting the court to do at the earliest time possible what would be the inevitable and final result. Chapter 110, Section 173, Illinois Revised Statutes, 1935, provides:

> "Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient.

November 10, 1960, more than one year after the death of the intestate. As to this item plaintiff replied that she ought not to be barred by reason of section 52, Chapter 110 of the Illinois Revised Statutes, 1959. A demurrer to this replication was sustained, and plaintiff electing to abide by her replication, judgment was entered for defendants. Mr. Justice Schaefer, speaking for the court, said:

> "The theory for which plaintiff contends would practically eliminate the provisions and limitation of the statutes, and that, clearly, was not the intention of the Legislature. The statutes upon which plaintiff's suit is based (in some form or another) restrict at instances and cases to the claims to the as all.'
>
> Dutton v. Illinois Life, 338 Ill. 57.
>
> No one contending that section of the statute sustains the construction for which plaintiff contends.
>
> Dunwood v. Postal Benefit Assn., 344 Ill. 1, 4.
>
> Jordan v. Illinois Bank of Bloomington, 345 Ill. 1, 4.
>
> Ivy v. Shields v. Lemon, 401 Ill. 474, 481."

In the instant case, as previously stated, suit was commenced against this defendant practically five years after the death of plaintiff's intestate. The trial court was right in sustaining the demurrer to this plea.

It is next contended by the plaintiff that the court erred in dismissing the suit as to the defendant and asked this court to reverse the case for a trial upon the merits. We fail to see the advantage which would result to plaintiff by a reversal of the decision of the trial court. The purpose of the new Practice Act, as we understand it, is to save time and expense in court procedure in permitting the court to do at the earliest time possible that would be the inevitable and final result. Chapter 110, Section 101, Illinois Revised Statutes, 1959, provides:

> "Upon a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specifically state such pleading or division thereof is insufficient.

After rulings on motions, the court may make such orders as to pleading over or amending as may be just."

In this case the record shows that S. A. T. Watkins, the defendant, was not summoned into court until nearly five years after the death of plaintiff's intestate, and plaintiff had no right to sue him at all, Hartray v. Chicago Rys. Co. 290 Ill. 85. Just what would be the advantage of going through the procedure of summoning a jury and introducing plaintiff's evidence to obtain an inevitable instruction to the jury to find the defendant not guilty, we fail to see.

We are of the opinion that the trial court had full power under the statute to dismiss the suit and his action therein was correct. The order and judgment of the Circuit Court is, therefore, affirmed.

ORDER AND JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

16 F

37656

ANNA HENDERSON,
Plaintiff in Error,

v.

MARY PARSILL et al.,
Defendants in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

283 I.A. 630

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Complainant sues out this writ of error to reverse a decree dismissing her amended bill for want of equity.

The amended bill alleges that on August 31, 1923, David B. Parsill and Mary Parsill, his wife, were the owners in fee simple, as joint tenants and not as tenants in common, of certain premises in Cook county, Illinois (describing them); that on that date, by a trust deed bearing date August 31, 1923, duly acknowledged and recorded, they conveyed the premises to Burt L. Hickok, in trust, to secure an indebtedness of $3,600, evidenced by their note due on or before three years from said date, with interest at six per cent per annum, payable semi-annually; that Parsill, for a long period of time prior to March 2, 1925, and until his death, acted as agent and fiduciary of complainant, had control and possession of her moneys, bonds and other assets, and had sole access to her safety deposit box in the Pioneer bank in Chicago, wherein said moneys and securities were deposited; that on behalf of and for the benefit of complainant he invested her funds in certain bonds, collected the interest thereon, withdrew moneys and assets of complainant from the deposit box for the purpose of investing the said moneys and assets in said bonds, and from time to time reported to complainant regarding

Complainant sues out this writ of error to reverse a decree dismissing her amended bill for want of equity.

The amended bill alleges that on August 22, 1922, David E. Parrill and Mary Parrill, his wife, were the owners in fee simple, as joint tenants and not as tenants in common, of certain premises in Cook county, Illinois (describing them); that on that date, by a trust deed bearing date August 22, 1922, duly acknowledged and recorded, they conveyed the premises to Mort L. Ehrman, in trust, to secure an indebtedness of $4,000, evidenced by their note due on or before three years from said date, with interest at six per cent per annum, payable semi-annually; that Parrill, for a long period of time prior to March 2, 1922, and until his death, acted as agent and fiduciary of complainant, had control and possession of her money, bonds and other assets, and had sole access to her safety deposit box in the Pioneer Bank in Chicago, wherein said moneys and securities were deposited; that on behalf of and for the benefit of complainant he invested her funds in certain bonds, collected the interest thereon, withdrew money and bonds of complainant from the deposit box for the purpose of investing the said money and bonds in said bonds, and from time to time converted to complainant's requesting

the nature and amount of the investments made by him for her and accounted to complainant for interest thereon as the same fell due; that about March 2, 1925, there were bonds in the amount of $2,500 in said safety deposit box, which were the sole property of complainant; that about said date Parsill withdrew from the deposit box a portion of the bonds amounting to the sum of $1,500, sold them for $1,500 and used that sum in the partial payment of the said indebtedness to Hickok, trustee, and at the same time, or prior thereto, paid the residue of the indebtedness and obtained from Hickok a release, dated March 2, 1925, of the said trust deed, which was filed for record, and complainant charges that the withdrawal and sale of the bonds in the sum of $1,500 by Parsill and the payment of the indebtedness due upon the said trust deed were done without the knowledge or consent of complainant and was a violation of the trust reposed in Parsill by complainant and a fraud upon her, and that Parsill thereby unlawfully converted the property of complainant to his own use; that Mary Parsill had full knowledge and notice of the right, title and interest of complainant in said bonds and of the unlawful conversion thereof by Parsill and the application of the same to the payment of the indebtedness secured by the trust deed; that when Parsill died, in 1926, the said premises were still held in joint tenancy by him and his wife, and the title of Parsill, under the law, became vested in Mary Parsill; that the bonds so deposited by complainant with Parsill constituted a trust fund and that he unlawfully used the same in the payment of the said indebtedness on said trust deed, and complainant "in equity is entitled to subrogation under the said trust deed for the amount of $1,500 and interest thereon of the said trust fund belonging to your oratrix so unlawfully paid by the said David B. Parsill on said indebtedness."

the nature and amount of the investments made by him for her and accounted to complainant for interest thereon as the same fell due; that about March 4, 1948, there were bonds in the amount of $2,000 in said safety deposit box, which were the sole property of complainant; that about said date Jerrell withdrew from the deposit box a portion of the bonds amounting to the sum of $1,000, sold them for $1,500 and used that sum in the partial payment of the said indebtedness to Hickok, Trustee; and at the same time, or prior thereto, paid the residue of the indebtedness and obtained from Hickok a release, dated March 4, 1948, of the said trust deed, which was filed for record, and complainant charges that the withdrawal and sale of the bonds in the sum of $1,000 by Jerrell and the payment of the indebtedness due upon the said trust deed were done without the knowledge or consent of complainant and was a violation of the trust imposed in Jerrell by complainant and a fraud upon her, and that Jerrell thereby unlawfully converted the property of complainant to his own use; that Mary Jerrell had full knowledge and notice of the trust, title and interest of complainant in said bonds and of the unlawful conversion thereof by Jerrell and the application of the same to the payment of the indebtedness secured by the trust deed; that that Jerrell did, in 1948, the said premises were still held in joint tenancy by him and his wife, and the title of Jerrell, under the law, became vested in Mary Jerrell; that the bonds so deposited by complainant with Jerrell constituted a trust fund and that he unlawfully used the same in the payment of the said indebtedness on said trust deed, and complainant "in equity is entitled to subrogation under the said trust deed for the amount of $1,500 and interest thereon of the said trust fund belonging to your oratrix so unlawfully paid by the said David H. Jerrell on said indebtedness."

Complainant prays that Mary Parsill and Burt L. Hickok, trustee, be made defendants to the bill and that upon a hearing the court will decree that the sum of $1,500 paid by Parsill on the indebtedness secured by the trust deed upon the premises inure to the benefit of complainant and that complainant is entitled to be subrogated and vested with a lien on the premises under the trust deed in the sum of $1,500, and that the release of said trust deed may be set aside and vacated, and that complainant may be decreed to have a lien upon the premises under the terms of the trust deed in the sum of $1,500 with interest thereon from March 2, 1925, at six per cent per annum.

The answer of Mary Parsill, in substance, admits that she and her husband, David B. Parsill, owned the property as alleged in the bill and that a mortgage was executed on it as alleged in the bill; denies that Parsill acted as agent and fiduciary of complainant and had control of and possessed money, bonds and other assets of complainant and had sole access to the safety deposit box of complainant as alleged in the bill; denies that he invested any of the funds or any money for complainant whatsoever, or withdrew from any deposit vault of complainant any of her money, assets or bonds, or at any time reported to her regarding investments as alleged in the bill; states that she does not know whether complainant was ever possessed of bonds in the amount of $2,500, and requires strict proof of the same; denies that her husband ever withdrew the amount of $1,500 or any other amount from the deposit box of complainant on or about March 2, 1925, or at any other date; denies that he ever sold any of complainant's bonds or that any moneys that he used for the purpose of paying the indebtedness secured by the trust deed were received from the sale of any bonds or other securities belonging to complainant; denies that she, defendant, at any time, ever had any knowledge or knew anything whatsoever of the alleged transactions set forth in the bill of complaint

complainant prays that Mary Murrill and Mary L. Murrill, trustees, be made defendants in the bill and that upon a hearing the court will decree that the sum of $1,000 paid by Murrill on the indebtedness secured by the deed of trust upon the premises inure to the benefit of complainant and that complainant is entitled to be subrogated and vested with a lien on the premises under the trust deed in the sum of $1,000, and that the balance of said trust deed may be set aside and vacated, and that complainant may be decreed to have a lien upon the premises under the terms of the trust deed in the sum of $1,000 with interest thereon from March 2, 1949, at six per cent per annum.

The answer of Mary Murrill, in substance, admits that she and her husband, David R. Murrill, owned the property as alleged in the bill and that a mortgage was executed on it as alleged in the bill; denies that Murrill acted as agent and fiduciary of complainant and had control of and possessed money, bonds and other assets of complainant and had sole access to the safety deposit box of complainant as alleged in the bill; denies that he invested any of the funds or any money for complainant whatsoever, or withdrew from any deposit vault of complainant any of her money, assets or bonds, or at any time reported to her regarding investments as alleged in the bill; states that she does not know whether complainant was ever possessed of bonds in the amount of $1,000, and requires strict proof of the same; denies that her husband ever withdrew the amount of $1,000 or any other amount from the deposit box of complainant on or about March 2, 1949, or at any other date; denies that he ever held any of complainant's bonds or that any money that he used for the purpose of paying the indebtedness secured by the trust deed were received from the sale of any bonds or other securities belonging to complainant; denies that she, defendant, at any time, ever had any knowledge or knew anything whatsoever of the alleged transactions set forth in the bill of complaint

charged against David B. Parsill; and denies that she had any knowledge that her husband ever converted any bonds or property of complainant, or used the proceeds of the same as in said bill alleged; states that she had known complainant for a long period of time but that complainant at no time ever revealed to her any of the matters alleged in the bill until months after the death of Parsill; states that for two weeks before the death of Parsill complainant was about the home of defendant and her husband, during which time complainant knew that Parsill was in imminent danger of death, but never at any time suggested anything to Parsill or defendant in reference to her rights or her property in the matters set forth in the bill.

A default was entered against Burt L. Hickok, trustee.

The cause was referred to a master in chancery to take proof and report the same with his conclusions of law and fact. Later, the term of office of the master in chancery having expired, he was appointed a special commissioner. The material parts of the special commissioner's report are as follows:

"III

"That David B. Parsill died December 6, 1926.

"IV

"That at the time of the death of David B. Parsill and for fifty-two years prior thereto he and the defendant Mary Parsill Taylor were husband and wife.

"V

"That at the time of the death of said David B. Parsill he and his wife were and had been for some time past the owners as tenants in common of the real estate situate in the County of Cook, State of Illinois, and described as follows: (Here follows legal description.) That said premises were improved with a two flat building, one of which was occupied by Mr. and Mrs. Parsill and the other rented to various tenants.

"VI

"That beginning in 1920 and continuing thereafter from time to time the complainant Anna R. Henderson gave small amounts of money to said David B. Parsill to be retained by him for her benefit, but from the testimony introduced on behalf of the complainant I am unable to find with any degree of accuracy the aggregate amount of such amounts.

charged against David E. Terrill, and denies that she had any knowledge that her husband was committed any act of cruelty or complainant, or had the property of the same as in said bill alleged, states that she had been complainant for a long period of time but that complainant at no time ever revealed to her any of the matters alleged in the bill until recently after the death of Terrill, states that for six years before the death of Terrill complainant was about the home of defendant and her husband, during which time complainant knew that Terrill was in imminent danger of death, but never at any time mentioned anything to Terrill or defendant in reference to her fidelity or her property in the matters set forth in the bill.

A Subpoena was issued against Mary T. Michael, Trustee.

The cause was referred to a master in chancery to take proof and report the same with his conclusions of law and fact. Later, the issue of affirm of the master in chancery having expired, he was appointed a special commissioner. The material parts of the special commissioner's report are as follows:

"I:

"That David E. Terrill died December 6, 1924.

"II:

"That on the date of the death of David E. Terrill and the fifty-two years prior thereto he and the defendant Mary Terrill together were husband and wife.

"V:

"That at the time of the death of said David E. Terrill he and his wife were not living together in the family relation in the county of Cook, state of Illinois, and identified as follows: (Here follows legal description). That said premises were improved with a two flat building, one of which was occupied by Mr. and Mrs. Terrill and the other rented to various tenants.

"VI:

"That Interested in LEO and remaining unmarried from time to time the complainant John T. Shoemaker gave small amounts of money to said David E. Terrill to be invested for his benefit, but that the testimony introduced on behalf of the complainant I am unable to find with any degree of accuracy the aggregate amount of such amounts.

"VII

"That on February 16, 1921 the complainant rented safety deposit box No. 1290 in the Pioneer Trust & Savings Bank under the name Anna Mauh and that the said David B. Parsill was given access thereto. That on December 15, 1926 the defendant surrendered said box and rented box No. 5918.

"VIII

"That David B. Parsill made entries into said box No. 1290 on October 6, 1925, October 19, 1925, December 4, 1925, December 15, 1925 and February 16, 1925.

"IX

"That the complainant made entries into said box No. 1290 October 18, 1926, and to box No. 5918 on January 8, 1926, June 1, 1927, June 25, 1927, July 2, 1927, July 11, 1927, July 23, 1927, August 29, 1927, February 6, 1928.

"X

"That prior to the death of said David B. Parsill complainant obtained from him all keys to said safety deposit box and when she examined said box on December 15, 1926 there was in said box her jewelry, some receipts for rent paid for the box and two bonds aggregating $1,000.00, all of which were retained by the complainant.

"XI

"That as a part of the purchase price of the premises owned by David B. Parsill and Mary Parsill, they executed to Burt L. Hickok, trustee, their certain trust deed dated August 31, 1923 for $3600.00. That on March 2, 1925 said David B. Parsill paid the indebtedness secured by said trust deed in full and delivered to said Burt L. Hickok one check for $2208.00, one check for $1,000.00, one check for $500.00 and cash in the sum of $1.24, in all aggregating $3,709.24, and thereupon the said Burt L. Hickok, trustee, delivered to said David B. Parsill a release of said trust deed.

"XII

"That at the time of his death and for a long time prior thereto said David B. Parsill maintained a checking account in the Pioneer State Savings Bank and that there was withdrawn from said account on March 2, 1925, the date upon which said trust deed was released, the sum of $2,208.00 which is the amount of one of the checks used in payment of said account.

"From the evidence offered I am unable to find the source of the further sum of $1500.00 used in the procuring of the release of said trust deed, although Charles E. Parsill, a son of said David B. Parsill and Mary Parsill Taylor, testified that the different times he loaned his father various sums, and at one time $1500, all of which were repaid, but the date of such loan was not established.

"XIII

"That the complainant has failed to establish that she ever delivered to David B. Parsill any sum in excess of $1,000.00 which was the amount of the bonds found in her box by her when she first examined the same and that she has failed to establish the material allegations of her bill of complaint.

"Conclusion

"I recommend that the complainant be dismissed for lack of equity, all of which is respectfully submitted."

"XIII

"That on February 14, 1921 the complainant rented safety deposit box No. 1800 in the Pioneer Trust & Savings Bank under the name John Smith and that the said John S. Smith and given correct information. That on December 12, 1926 the defendant surreptitiously will been and crushed box No. 1800.

"XIV

"That David R. Jewell made another false entry in box No. 1800 on October 6, 1928, October 16, 1928, December 4, 1928, December 12, 1928 and February 14, 1929.

"XV

"That the complainant made another false entry in box No. 1800 October 12, 1931. And in box No. 2000 on January 8, 1932, June 1, 1932, June 20, 1932, July 5, 1932, July 11, 1932, July 28, 1932, August 30, 1932, February 6, 1933.

"I

"That prior to the trial of said Jewell R. Jewell complainant obtained from his attorney in said criminal proceeding but that the defendant will that on December 12, 1932 there was in said box the jewelry, same described that said jewelry the said defendant has been supplying 12,000.00, all of which were purchased by the complainant.

"II

"That as a part of the consideration given at the purchase owned by David R. Jewell and Mary Jewell, they executed to Jack De Grace, Inverness, their certain first-mortgage bonds, 12, 1932 for $3000.00. That on March 1, 1932 said David R. Jewell paid the $3000.00. That on March 1, 1932 said David R. Jewell and defendant executed by with Trust Bond by full and delivered to said Jack De Grace for the 1000.00, and check for 1,000.00, was issued for jewelry and check in the sum of $1,784, in all aggregating $3,784.34, and therefore the said Jack R. Grace, Trustee, delivered to said David R. Jewell a release of said Trust Bond.

"III

"That at the time of his death and for a long time prior thereto said Jewell was actually employed a quantity, amounts in the Pioneer Trust Savings Bank and that which the defendant from said accounts on March 1, 1932, the said John Smith Bond was released, the sum of $3,000.00 which is the amount of one of the Trustee bond in payment of said account.

"That the evidence adduced I am unable to find the amounts of the former one of [illegible] bond in the possession of the Defendant of said trust bond, although Charles R. Jewell, a son of said David R. Jewell and Mary Jewell Taylor, testified that the defendant claims he leaves his father was some open, and in our view doubt, all of which were false. But the time of such loss has not established.

"XIII

"That the complainant has failed to establish that she ever delivered to David R. Jewell any sum in excess of $3,000.00 which was the amount of the bonds issued by her and by the time the first mortgage matured the bank and she has failed to establish the material allegations of her bill of complaint.

"Conclusion

"I recommend that the complainant be dismissed for lack of equity, all of which is respectfully submitted."

The chancellor overruled complainant's exceptions to the report and entered a decree dismissing the amended bill for lack of equity upon the ground that complainant had failed to establish the material allegations of her amended bill. Complainant and defendant agree that the decree dismissing the bill for want of equity was entered by the chancellor because he approved the finding of the special commissioner that David B. Parsill never had in his possession more than $1,000 belonging to complainant and that that sum was delivered to complainant prior to Parsill's death. Both parties also agree that complainant's case is based upon the theory of a constructive trust.

Complainant contends that the finding of the special commissioner is not justified by any evidence in the case, that every material allegation of the bill is sutained by evidence which is uncontroverted. The transcript of evidence is a comparatively short one and in our study of the evidence we have read it instead of the abstract. After a careful consideration of the facts and circumstances we have reached the conclusion that complainant's contention is a meritorious one.

The following facts are not controverted: Complainant and David B. Parsill became acquainted in 1903 and were always very good friends. Parsill died on December 6, 1926. In 1920 complainant had trouble with her husband about money matters and consulted the Parsills in reference to the same. Mrs. Parsill, in the presence of her husband, suggested that complainant should not leave her money at home where her husband might get it; that Parsill should get a vault at the bank but that complainant should not take the keys to the vault and should allow Parsill to retain them, he to have the privilege of going to the vault and taking care of complainant's money and papers. Complainant then gave Parsill certain papers

The chancellor entered complainant's complaint in the papers and entered a decree directing the executor will for lack of equity upon the ground that complainant had failed to establish the material allegations of her counter bill. Complainant and intervenors argue that the Probate Court's will for want of equity was entered by the chancellor because he approved the finding of the special commissioner once David M. Terrill never had in his possession more than $2,000 belonging to complainant and that she was delivered to complainant prior to Terrill's death. Both parties also argue that complainant's case is based upon the theory of a constructive trust.

Complainant contends that the finding of the special commissioner is not justified by any evidence in the case, that every material allegation of the bill is supported by evidence which is uncontroverted. The lessening of evidence is a comparatively light one and in our study of the evidence we have kept it in mind of the defense. After a careful consideration of the facts and circumstances we have reached the conclusion that complainant's contention is a meritorious one.

The following facts are our conclusions: Complainant and David M. Terrill became acquainted in 1908 and were always very good friends. Terrill died on December 6, 1920. In 1920 complainant had trouble with her husband about money matters and consulted the Terrills in reference to the case. Mrs. Terrill, in the presence of her husband, suggested that complainant should not leave her money at home where her husband might get it; that Terrill should put a vault at the bank but that complainant should not take the keys to the vault and should allow Terrill to assist them. He to have the privilege of going to the vault and taking some of complainant's money and papers. Complainant then gave Terrill certain papers

and $15 or $20 in money. A day or so later Mrs. Parsill stated to complainant that Parsill had rented a box at Pioneer bank. In 1920 complainant received $437 from her father's estate and gave that amount to Parsill. In the same year she gave him the "Parson's mortgage" in the amount of $800. She kept no record of the amounts given to Parsill and obtained no receipts from him, but it appears from her testimony that she gave him, from time to time, amounts ranging from $15 to $200. In the early fall of 1924 the Parsills took her to the deposit box and showed her five $500 "bonds on buildings," as belonging to her. Mrs. Parsill told her that whenever Parsill had $500 of complainant's money he would buy a bond; that the bonds paid six per cent interest. In March, 1926, Mrs. Parsill told complainant that she and Parsill had taken three of complainant's bonds out of the vault to pay a $1,500 loan on their property; that they had taken them out "quite a long time ago" and had not said anything to her about the matter because they thought complainant would think their action was all right. Complainant never took any of the bonds or papers from the box. It is also conceded that at the time of the death of Parsill there were only two bonds in the box. Albert Rauh testified that at the time that complainant got a divorce from her husband Mrs. Parsill told him that she and her husband were complainant's guardians and took care of all of her business; that complainant would bring money to her and they would buy bonds for her whenever they got $500 together; that in June, 1926, Mrs. Parsill, in the presence of her husband, complainant and the witness, stated that they owed complainant $1,500; that complainant gave Parsill a painting job to cost $90, and Mrs. Parsill said that job would make it easier for them to pay the $90 interest due on the $1,500. Complainant also testified to this last statement of Mrs. Parsill. Burt L. Hickok, engaged in the real estate business, testified that he knew David B. Parsill and

and 12% or 6.00 in money. A day or so later Mrs. Purcell stated to complainant that Purcell had traded a box of Tiffany beds.

In 1920 complainant received 1117 from Mrs. Tabor's estate and gave that amount to Purcell. In the same year she gave him the "Hansen's mortgage" in the amount of 1000. She kept no record of the amounts given to Purcell and obtained no receipts from him. But it appears from her testimony that she gave him, from time to time, amounts ranging from 12 to 1000. In the early fall of 1924 the Purcells took her to the deposit box and showed her five 1000 "bonds on building," as belonging to her. Mrs. Purcell said her husband whenever Purcell had 1000 of complainant's money he would buy a bond, that she usually gave him six per month interest. In March, 1928, Mrs. Purcell told complainant that she and Purcell had taken shares of complainant's bonds out of the vault to pay a 1,500 loan on their property; and they had taken them out "quite a long time ago" and had not said anything to her about the matter because they thought complainant would think their action was all right. Complainant never took any of the bonds or papers from the box. It is also conceded that at the time of the death of Purcell there were only two bonds in the box. Albert Hunt testified that at the time that complainant got a divorce from her husband Mrs. Purcell told him that she and her husband were complainant's guardians and took care of all of her business; that complainant would bring money to her and they would buy bonds for her whenever they got 1000 together; that in June, 1926, Mrs. Purcell, in the presence of her husband, complainant and the witness, stated that they owed complainant 1,500; that complainant gave Purcell a printing job to cost 150, and Mrs. Purcell said that job would only be worth 7 or 8 for them to pay the 150 interest due on the 1,500. Complainant also testified to this last statement of Mrs. Purcell. Mark L. Hanson, engaged in the real estate business, testified that he knew David K. Purcell and

Mrs. Parsill well and had a number of real estate deals with Parsill; that the Parsills purchased from him the two-flat building at 733 North Harding avenue, the premises in question; that he handled the matter of the payment and release of the Parsill mortgage on the premises; that there was then due on the mortgage a total of $3,709.74 and the Parsills made the payment by three checks, one for $2,208, a second for $1,000, a third for $500, and also cash in the amount of $1.24; that during his many transactions with the Parsills he saw Mrs. Parsill nearly as often as he did Parsill; that complainant's name was mentioned in some of the conversations he had with the Parsills; that on August 15, 1925, Parsill told him that he was taking care of the money matters of complainant; that it was a case where he was preserving her money and increasing it by investments of different kinds; that he had increased her money to some extent and was holding her confidence because of the increases; that he had conversations with the Parsills on the subject of their relationship to complainant perhaps a dozen times in the course of two or three years; that Mrs. Parsill spoke about money in the vault at the Pioneer bank; that Mr. and Mrs. Parsill both talked to the witness about complainant's money, their care of it, and that they were increasing its sum total by investment in bonds; that Parsill stated that he used complainant's money to invest at his discretion without her consent, except a tacit one, and that it was his habit to take her money when he saw a good investment and invest it and tell her about it afterwards; that the Parsills paid the principal and interest upon the mortgage on March 2, 1925. When the deposit box was rented Parsill retained one key to the same and Mrs. Parsill the other, and complainant never had a key to the box until shortly before Parsill's death. The box was taken out in the maiden name of complainant because Mrs. Parsill said that if complainant's husband found out about the box he would make trouble. The

Mr. Farrell well and had a number of long talks with Farrell; that the Farrells purchased from his father building on the North Burling avenue, the premises in question; that he handled the matter of the payment and release of the Farrell mortgage on the premises; that there was then due on the mortgage a total of $8,708.73 and the Farrells were the payees by three checks, one for $2,500, a second for $1,000, a third for $500, and also cash in the amount of $1,8[illegible]; that during his many conversations with the Farrells he saw Mrs. Farrell nearly as often as he did Farrell; that complainant's name was mentioned in some of the conversations he had with the Farrells; that on August 12, 1940, Farrell told him that he was taking care of the money matters of complainant; that it was a case where he was preserving her money and increasing it by investments or different kinds; that he had invested her money in some stock and was holding her certificates because of the interest; that he had conversations with the Farrells on the subject of their relationship to complainant perhaps a dozen times in the course of two or three years; that Mrs. Farrell spoke about money in the years at the Pioneer bank; that Mr. and Mrs. Farrell both talked to the witness about complainant's money, their care of it, and that they were investing it as was usual by investment in bonds; that Farrell stated that he had complainant's money in layout at his discretion without her consent, except a basis one, and that it was his habit to take her money when he saw a good investment and invest it and tell her about it afterwards; that the Farrells had the physical use and control of the mortgage on March 6, 1938. When the deposit box was rented Farrell rented one box in the name of Mrs. Farrell the other, and complainant never had a key to the box until shortly before Farrell's death. The box was taken out in the joint name of complainant because Mrs. Farrell said that if complainant's husband found out about the box he would make trouble. The

three bonds complainant claims were taken from the box by Parsill were never returned to the box nor to her, nor was complainant paid any moneys or given any valuables as an equivalent for them. The records of the Pioneer bank, where Parsill kept his bank account, show that on September 15, 1924, Parsill made a deposit of $1,545, and complainant contends that this amount represents the sale by Parsill of the three bonds taken from the box and six months' interest upon the same. It also appears from the bank records that the $2,208 check given by Parsill to Hickok in partial payment of the mortgage indebtedness was drawn upon a bank balance that was partially made up by the $1,545 deposit. Prior to the deposit of $1,545 Parsill's balance at the bank was $546.47, and after the $2,208 check was paid by the bank Parsill's balance was $41.42.

Mrs. Parsill testified that her husband left no personal property, had no bank account, no cash on hand and no books of account; that he kept no books of account nor accounts of money received and spent; that she knows nothing at all about his business; that "he done his own business and he never told me anything about it;" that she knows nothing about the payment of the mortgage to Hickok; that "he never told me anything about his business," and she knows nothing about a release made by Hickok. "Q. Did you know that Hickok had any business relations with your husband? A. No. Q. You didn't know that Hickok had a mortgage on the property? A. No. Q. And you didn't know your husband paid the mortgage on the property? A. No, I don't. Q. Where did your husband keep his papers? A. I don't know. I didn't see any. Q. Did you see any checks? A. No. Q. After his death or before his death? A. I didn't see no checks. There was a couple checks laying there from the gas and electric bill. That's all I seen. Q. Were they signed by Mr. Parsills? A. Yes. Q. You did know then that he had an account at some time?

Have been complaining clients very often from the bank by Terrill
were never returned to him nor is he, nor the complainant
paid any money or given any valuables as an equivalent for them.
The records of the Pioneer Bank, where Terrill kept his bank account,
show that on September 22, 1924, Terrill made a deposit of $1,848,
and complainant contends that this amount represents the sale by
Terrill of the three bonds taken from the box and six months'
interest upon the same. It also appears from the bank records that
the $7,000 check given by Terrill to Hickok in partial payment of the
mortgage indebtedness was drawn upon a bank balance that was ex-
clusively made up by the $1,848 deposit. Prior to the deposit of $1,848
Terrill's balance at the bank was $848.47, and after the $6,000
check was paid by the bank Terrill's balance was $1.48.

Mrs. Terrill testified that her husband left no personal
property, had no bank account, no cash on hand and no books of
account; that he kept no books of account nor accounts of money
received and spent; that she knew nothing of all about his business
affairs; "he knew his business and he never told me anything about
it"; that she knew nothing about the payment of the mortgage to
Hickok; that "he never told me anything about his business," and she
knew nothing about a release made by Hickok. Q. Did you know
that Hickok had any business relations with your husband? A. No.
Q. You didn't know that Hickok had a mortgage on the property? A. No.
Q. And you didn't know your husband paid the mortgage on the property?
A. No, I don't. Q. Where did your husband keep his papers? A.
I don't know. I didn't see any. Q. Did you see any checks? A. No.
Q. After his death or before his death? A. I didn't see no checks.
There was a single check laying there from the gas and electric
bill. That's all I seen. Q. Were they signed by Mr. Terrill?
A. Yes. Q. You did know then that he had an account at some time?

A. I don't know nothing about it. I seen the checks, but I never paid no attention to anything like that. I knew he had gas bills that he paid. That's all I know. Q. Did you find any release deed with the abstract? A. No. Q. Did you find any other papers with the abstract? A. No sir, there was nothing there. Q. What did he do with the bills which he paid? A. I don't know. * * * Q. And you have never seen any checks? A. No, sir. He kept his business to himself. He didn't ask me no questions and he done his business himself. Q. And he kept no bills? A. Not that I know of. Q. He had no letter file or bill file? A. I never saw anything. Q. So as a matter of fact, at the time he died you didn't know anything at all about his affairs? A. No, sir. Q. You didn't know that he had any money in the bank or ever had any money in the bank? A. I didn't pay no attention to nothing in his business. Q. And you didn't know anything about any connection he had with Mr. Hickok - you didn't know anything about whether there was a mortgage on the property or not? A. No sir, I didn't. Q. Have you any means of ascertaining where Mr. Parsille kept his cancelled checks or check book stubs? A. No, sir, I haven't. * * * Q. Yes, but you never saw one (check book) of David B. Parsille? A. No. Q. And you don't know any place that you could go to get the information in regard to his checks? A. No sir, I don't know nothing about it. I don't - I wouldn't know where to go for anything like that. Q. If you wanted one of those checks, for example, you wouldn't know where to go and find it, it that correct? A. No, I wouldn't, no, sir." About fourteen months after her first testimony defendant was again called to testify before the special commissioner. At that time she testified that she had some knowledge of real estate transactions in which Parsill had figured, that rents and boarders money was saved towards mortgages, that Parsill sometimes consulted her regarding real estate purchases

A. I don't know anything about it. I mean the checks, but I never paid no attention to anything like that. I knew he had you bills list to pay. That's all I know. Q. Did you find any release deed with the abstract? A. No. Q. Did you find any other papers with the abstract? A. No sir, there was nothing there. Q. What did he do with the bills which he paid? A. I don't know. * * *. And you have been soon any market? A. No, sir. He kept his business to himself. Q. Didn't had no questions and he done his business himself. Q. And he kept no bills? A. Not that I know of. Q. He had no letter file or bill file? A. I never saw anything. Q. As a matter of fact, at the time he died you didn't know anything at all about his affairs? A. No, sir. Q. You didn't know that he had any money in the bank or ever had any money in the bank? A. I didn't pay no attention to nothing in his business. Q. And you didn't know anything about any connection he had with Mr. Hickok - you didn't know anything about whether there was a mortgage on the property or not? A. No sir, I didn't. Q. Have you any means of ascertaining where Mr. Vanzile kept his commission which he claim had about? A. No, sir, I haven't. * * * Q. You, but you never saw one (check book) of David B. Ratcliff? A. No. Q. And you don't know my place that I could go to get the information in regard to his checks? A. No sir, I don't know nothing about it. I don't - I wouldn't know where to go for anything like that. Q. If you wanted one of these checks, for example, you wouldn't know where to go and find it, is that correct? A. No, I wouldn't, no, sir." Upon cross-examination after the first examiner referred was again called to testify before the special commissioner. At that time she testified that she had some knowledge of real estate transactions in which Ratcliff had figured, that rents and executors money was moved towards mortgages, that Ratcliff sometimes wrote in payments - not total payments

but that he never consulted her in relation to the purchase of bonds or other investments. She made no denial of any of the testimony of complainant, Hickok or Rauh as to the part taken by her in the Henderson matter. As she was represented by one of the ablest trial lawyers at the Chicago bar, and as the hearing before the special commissioner dragged along for over a year, it is clear that her failure in that regard was not due to negligence on the part of her attorney. Indeed, her present counsel state in the brief filed in this court that "the fact is that Mary Parsill at the time of the trial was 74 years old and a reading of her testimony discloses that she was entirely unfamiliar with the dealings had between the complainant and Mr. Parsill and was generally unfamiliar with her husband's business affairs." The evidence conclusively shows that she took an active part in the conversion and use of the three bonds. Defendant's son testified that in 1924 or 1925 he loaned his father $1,500 and that some time after he made the loan it was paid; that his mother boarded the two nephews of the witness. On cross-examination the witness testified that he gave his father a check for the $1,500 before the spring of 1926; that his father paid him the $1,500 loan by a check on the Pioneer bank about six months or so after the loan was made. The bank record shows no deposit by Parsill from November, 1923, to his death of a sum of $1,500, or more, save two, one of $2,351, on March 3, 1924, and another, on September 15, 1924, of $1,545. After the check of $2,351 was deposited, two checks for $1,500 each were drawn, one dated March 4, 1924, and the other March 7, 1924. It is clear that the deposit of $2,351 did not include the alleged loan by the son. It is equally clear that the deposit of $1,545, on September 15, 1924, had no reference to the alleged loan by the son, as he testified that the loan he made the father was repaid by the latter six months after it was made, by the father's check on the Pioneer bank, and the bank records show that

but she he never consented her in relation to the purchase of bonds or other investments. She made no denial of any of the testimony of complainant, either of fact as to the part taken by her in the Dunstreen matter. He also was prepossessed by one of the ablest trial lawyers at the Chicago bar, and as the hearing before the special commissioner dragged along for over a year, it is clear that her failure to show regard was not due to negligence on the part of her attorney. Indeed, her present counsel admits in the brief filed in this court that "the fact is that Mary Dowell at the time of the trial was 76 years old and a teaching of her testimony discloses that she was naturally unfamiliar with the dealings **had** between the complainant and Mr. Darrell and was generally unfamiliar with her husband's business affairs." The evidence conclusively shows that she took an active part in the conversion and use of the three bonds. Defendant's son testified that in 1914 or 1920 he loaned his father $1,500 and that some time after he made the loan **it** was paid; that his mother handed him two coupons of the bonds. On cross-examination the witness testified that he gave his father a check for the $1,500 before the spring of 1918; that his father paid him the $1,500 loan by a check on the Pioneer bank about six months or so after the loan was made. The bank record shows no deposit by Darrell from December, 1917, in the amount of a sum of $1,500, or more, save two, one of $2,257, on March 3, 1914, and another, on September 18, 1914, of $1,818. After the check of $2,257 was deposited, two checks for $1,800 each were drawn, one dated March 4, 1914, and the other March 7, 1914. It is clear that the deposit of $1,500 did not include the alleged loan by the son. It is equally clear that the deposit of $1,818, on September 18, 1914, had no relation to the alleged loan by the son, so he testified that the loan he made the father was repaid by the latter six months after it was made, by the father's check on the Pioneer bank, and the bank records show that

no check in any such amount was paid by the bank at any time after the deposit of $1,545 was made. Defendant failed to produce the check drawn by the son or the check drawn by the father in the matter of the alleged loan.

Much of the brief of defendant is devoted to the argument that the burden was upon complainant to prove her case by clear and convincing proof. For the purposes of this writ of error we may assume that defendant's position in that regard is sound. We are satisfied that the evidence clearly and conclusively shows that the Farsills converted three bonds of $500 each that belonged to complainant and used the proceeds of the same in paying the Hickok mortgage on the premises in question, and that the Farsills, at the time of the death of Farsill, owed the complainant, in addition to the two $500 bonds found by her in the deposit box, the $1,500 and interest upon the same.

The decree of the Superior court of Cook county is reversed and the cause is remanded with directions to the chancellor to enter a decree in accordance with the prayer of complainant's amended bill.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

no chance in any such amount was paid by the bank at any time after the deposit of $1,840 was made. Defendants failed to produce the check issued by the bank or the check drawn by the Indian in the amount of the alleged loan.

Upon of the burden of defendants is bounded to the argument that the burden was upon complainants to prove not even by clear and convincing proof. For the purposes of this suit, or error on my account that defendant's position in that regard is sound. We are satisfied that the evidence clearly and conclusively shows that the Pacific converted three bonds of $500 each that belonged to complainant and used the proceeds of the same in paying the indebtedness on the premises in question, and that the Pacific, at the time of the death of Darrell, held the complainant's in addition to the two $500 bonds loaned by her to the deceased, the $1,840 and interest upon the same.

The course of the superior court of Cook County in presented and the case is remanded with directions to the chancellor to enter a decree in accordance with the prayer of complainant's amended bill.

REMANDED WITH DIRECTIONS.

Mathews and Tinkham, JJ., concur.

38063

PEOPLE ex rel. PARK RIDGE PARK DISTRICT, a Municipal Corporation, (Petitioner) Appellant,	APPEAL FROM CIRCUIT
v.	COURT OF COOK COUNTY.
INDUSTRIAL COMMISSION OF ILLINOIS, (Respondent) Appellee.	283 I.A. 630

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Park Ridge Park District, a municipal corporation, filed its petition for a writ of prohibition to prohibit and enjoin the Industrial Commission of Illinois from proceeding further in the matter of Halbert O. Crews, Administrator of the Estate of Charles P. Vidas v. Park Ridge Park District, a Municipal Corporation, pending before the Commission. An order was entered ruling the Commission to show cause why a writ of prohibition should not be awarded. The Commission, also the administrator, filed a motion to dismiss the petition. Thereafter a final order was entered discharging the rule to show cause and dismissing the petition. The petitioner appeals.

The petition alleges that Crews, as administrator of the estate of Vidas, filed a claim before the Commission for the death of Vidas, who was killed while driving a truck for the Park Ridge Park District, on November 10, 1930; that in the said claim it was alleged that Vidas "left him surviving a sister, Romana Milos, living in Mreljin, Jugo Slavia;" that the said claim showed "no other surviving dependents or heirs of the deceased;" that Romana Milos was at all times a resident of Jugo Slavia; that by the Illinois statutes, when dependents of a deceased employee are

aliens, not residing in the United States or Canada, the amount of compensation payable is limited to the widow, husband, parents, child or children of the deceased; that the Commission has no jurisdiction to entertain the claim nor to determine or award compensation for the death of Vidas under the application for adjustment of claim filed by the administrator; that the effort of the Commission to entertain the claim was ultra vires and a usurpation of authority not granted by the statutes of Illinois; that on March 29, 1934, the petitioner attempted to have the Commission dismiss the claim on the ground that it had no jurisdiction to entertain it, but the Commission refused to dismiss the claim and is prepared to exceed its jurisdiction by hearing the claim on its merits; that the petitioner, if forced to defend the claim upon the merits, would be put to great and useless expense, i.e., "taking depositions in Jugo Slavia as well as securing of local evidence on the question of dependency, whereas it has a complete legal defense to the entire claim." A copy of the application for adjustment of the claim filed by the administrator with the Commission March 20, 1931, was made a part of the petition. It sets forth that on November 10, 1930, Charles P. Vidas, deceased, received an injury causing his death, which injury arose out of and in the course of his employment by the Park Ridge Park District; that the applicant is the administrator of the estate of the deceased, who was sixty years of age at the time of the injury; that deceased, while driving a truck owned by the Park District was struck by a train at Park Ridge, Illinois, and killed; that his earnings during the previous year were $1,600; that Romano Milos, of Hrvljin, Croatia, Jugoslavia, a collateral heir, was dependent upon the deceased at the time of the injury.

Petitioner concedes that prior to July 3, 1931, the

aliens, not residing in the United States or Canada, the amount of compensation payable is limited to the widow, husband, parents, child or children of the deceased; that the Commission has no jurisdiction to entertain the claim nor to determine or award compensation for the death of Tyler under the application for adjustment of claim filed by the administrator; that the mother of the deceased is contesting the claim and claims sole and exclusive of administrator; that the mother of Tyler, by the statute of Illinois; that on March 20, 1921, the petitioner attempted to have the Commission dismiss the claim on the ground that it had no jurisdiction to entertain it, but the Commission refused to dismiss the claim and is proceeding to assess the jurisdiction by hearing the claim on its merits; that the petitioner, if forced to defend the claim upon the merits, could so do in person and produce witnesses, that, "Federal regulations in Japan Claims as well as according of local evidence on the question of dependency, whereas in has a reasonable legal interest in the certain claim," a copy of the application for adjustment of the claim filed by the administrator with the Commission March 20, 1921, was made a part of the petition. It was found that on November 10, 1920, Charles T. Tyler, deceased, received an injury causing his death, which injury arose out of and in the course of his employment by the Yuki Kaiya Fork Kiaisha; that the applicant is the administrator of the estate of the deceased, who was sixty years of age at the time of the injury that deceased, while driving a truck owned by the Yuki Kaiyaki was struck by a train at New York, Illinois, and killed; that his earnings during the previous year were $1,[illegible]; that [illegible] of [illegible], Illinois, Independent, a relative not dependent upon the deceased at the time of the injury.

Petitioner concedes that prior to July 4, 1921, the

right to compensation for the death of an employee under the Workmen's Compensation act was not limited to any class or classes of alien dependents. On that date the act was amended by the addition of section 7 (j) to par. 207, ch. 48, which provides:

> "Whenever the dependents of a deceased employee are aliens not residing in the United States or Canada, the amount of compensation payable shall be limited to the beneficiaries described in paragraphs (a), (b) and (c) of this section and shall be fifty per centum of the compensation provided in paragraphs (a), (b) and (c) of this section."

Petitioner contends that as section 7 (j) does not mention class "(d)" the right of a collateral heir who is not a resident of the United States or Canada to receive compensation was thereby abolished, and that although Vidas died on November 10, 1930, and the claim was pending prior to July 3, 1931, the repeal of the statute that gave a cause of action to an alien sister ended the instant claim and that under the act as amended a cause of action for compensation for dependents not residing in the United States or Canada is now limited to widow, husband, children or parents of the deceased.

Respondent contends that "there is nothing in the language of Section 7-J which in any manner indicates that the legislature intended that section to apply to claims which were pending before the Commission at the time the Act became effective. (Havill v. Havill, 332 Ill. 11, 17.)"; that "under the Workmen's Compensation Act, the rights of the parties are fixed as of the time of the happening of the accident;" that the Commission also had jurisdiction over the claim for the following reasons:

> "1. That by virtue of Chapter 131, Section 4, Paragraph 4, Smith-Hurd's Illinois Revised Statutes, claims which arose under the Workmen's Compensation Act prior to the amendment of July, 1931, by the addition of Section 7-J to the Workmen's Compensation Act are saved,- that section being a general statutory saving clause.
>
> "2. That the Industrial Commission had jurisdiction to determine whether or not there were any dependents

right to compensation for the death of an employee under the Workmen's Compensation Act was not limited to any class or classes of alien dependents. In that case the act was amended by the addition of section 7 (j) to sec. 307, ch. 49, which provides:

"Whenever the dependents of a deceased employee are aliens residing in the United States or Canada, the amount of compensation payable shall be limited to the beneficiaries described in subparagraphs (a), (b) and (c) of this section and shall be fixed and payable as if the compensation provided in paragraphs (a), (b) and (c) of this section."

Petitioner contends that as section 7 (j) does not mention clause "(d)" the rights of a collateral heir who is not a resident of the United States or Canada in respect compensation are thereby abrogated, and that although Tiden died on November 10, 1920, and the claim was pending prior to July 5, 1923, the repeal of the statute that gave a cause of action to an alien either bars the insurance claim and that under the act he asserted a cause of action for compensation for dependents not residing in the United States or Canada is not limited to wives, husband, children or parents of the deceased.

Respondent contends that "there is nothing in the language of Section 7-J which in any manner indicates that the legislature intended that section to apply to claims which were pending before the Commission at the time the act became effective. (Morill v. Smith, 224 Ill. 21, 27.)" that "under the workmen's Compensation Act, the rights of the parties are fixed as of the time of the happening of the accident;" that the Commission also had jurisdiction over the claim for the following reasons:

"1. That by virtue of Chapter 123, Section 4, Paragraph 4, Smith-Hurd's Illinois Revised Statutes, claims which arose under the Workmen's Compensation Act prior to the amendment of July, 1923, by the addition of Section 7-J to the workmen's Compensation Act are saved,- that section being a general saving clause.

"2. That the Industrial Commission had jurisdiction to determine whether or not their very jurisdiction

> entitled to receive compensation under paragraphs (a), (b), (c) or (d) of Section 7 and if none, the Industrial Commission had jurisdiction to determine whether or not the accident was a compensable accident within the meaning of the Workmen's Compensation Act, and to award not more than $150.00 to the person burying the deceased, and in addition thereto, to award to the State Fund $300.00."

The instant appeal is, in our opinion, controlled by Stanswsky v. Industrial Com., 344 Ill. 436. That case sustains the ruling of the trial court.

The judgment of the Circuit court of Cook County will be affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

[illegible]

[illegible]

[illegible]

18 A

38077

FRANK KRACKER,
Appellee,

v.

JAMES W. BURKE,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

282 I.A. 630

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in a first class action. In a trial by the court without a jury the issues were found against defendant and plaintiff's damages were assessed at $725. Defendant appeals from a judgment entered upon the finding.

Plaintiff's verified statement of claim alleges that defendant, an attorney at law, agreed to collect a certain promissory note in the principal sum of $1,000 owned by plaintiff and to accept for his services the sum of $100; that defendant procured judgment by confession on the note for the sum of $1,086.76, collected the judgment and costs and entered satisfaction of the judgment. Plaintiff further alleges that defendant undertook to collect for plaintiff and did collect the sum of $100, evidenced by a certain check in that amount signed by Frank Hartman and payable to plaintiff; that defendant has not paid to plaintiff either of the said sums collected, to the damage of plaintiff in the sum of $1,261.26.

Defendant's affidavit of merits admits that plaintiff turned over to him the promissory note, but denies that he agreed to accept ten per cent of the amount of the note in payment of his fees and avers that plaintiff agreed to pay him one-half of whatever

Plaintiff used defendant in the Municipal court of Chicago in a first class action. In a trial by the court without a jury the issues were found against defendant and plaintiff's damages were assessed at $750. Defendant appeals from a judgment entered upon the finding.

Plaintiff's verified statement of claim alleges that defendant, an attorney at law, agreed to collect a certain promissory note in the principal sum of $1,[illegible] owed by plaintiff and to accept for his services the sum of $1-00; that defendant procured judgment by confession on the note for the sum of $1,[illegible].75, collected the judgment and deducted and retained satisfaction of the judgment. Plaintiff further alleges that defendant undertook to collect for plaintiff and did collect the sum of $1[illegible], evidenced by a certain check in that amount signed by Frank Bartman and payable to plaintiff; that defendant has not paid to plaintiff either of the said sums collected, to the damage of plaintiff in the sum of $1,[illegible].

Defendant's affidavit of merits admits that plaintiff turned over to him the promissory note, but denies that he agreed to accept ten per cent of the amount of the note in payment of his fees and avers that plaintiff agreed to pay him one-half of whatever

sum was realized on the note; defendant admits that he secured judgment by confession on the note in the amount of $1,086.76, and avers that the judgment, under the direction of plaintiff, was compromised for the sum of $850 and satisfaction of the judgment was filed. Defendant further alleges that plaintiff engaged defendant's services as an attorney at law to represent him in a criminal case in the United States court, that defendant did represent plaintiff and the latter agreed to pay defendant for his services "in part with the moneys collected or to be collected on said note." Defendant further alleges that plaintiff requested him to professionally represent him in a case wherein plaintiff was charged with rape and that defendant did represent plaintiff in said case, and "that part of the remuneration of the Defendant should be whatever balance or moneys could or would be collected on the said note and other notes turned over to the defendant by the Plaintiff." Defendant further alleges that he never undertook to collect any check in the sum of $100 for plaintiff but that said $100 check was turned over by plaintiff to defendant in further payment of the professional services above set forth, "and therefore the defendant says that he is not indebted to the plaintiff."

Defendant contends that "the finding and judgment of the trial Court are against the manifest weight of the evidence." After a careful examination of the entire evidence we have reached the conclusion that we cannot sustain this contention. The case was tried by an able and experienced judge, who saw and heard the witnesses and was in a better situation than we are to determine the credibility of the witnesses and the weight that should be attached to their testimony. In connection with the instant contention we have considered the argument of defendant that the testimony of plaintiff is so contradictory that it is worthless for

sum was realized on the note; defendant admits that he secured judgment by confession on the note in the amount of $1,[illegible], and avers that the judgment, under the direction of plaintiff, was compromised for the sum of $800 and satisfaction of the judgment was filed. Defendant further alleges that plaintiff engaged defendant's services as an attorney at law to represent him in a criminal case in the United States court, that defendant did represent plaintiff and the latter agreed to pay defendant for his services "in part with the money collected or to be collected on said note." Defendant further alleges that plaintiff requested him to professionally represent him in a case wherein plaintiff was charged with rape and that defendant did represent plaintiff in said case, and "that part of the remuneration of the Defendant should be thirty Dollars or money could or would be collected on the said note and other notes turned over to the defendant by the Plaintiff." Defendant further alleges that he never undertook to collect any check in the sum of $100 for plaintiff but that said $100 check was turned over by plaintiff to defendant in further payment of the professional services above set forth, "and therefore the defendant says that he is not indebted to the plaintiff."

Defendant concludes that "the finding and judgment of the trial Court are against the manifest weight of the evidence." After a careful examination of the entire evidence we have reached the conclusion that we cannot sustain this contention. The case was tried by an able and experienced judge, who saw and heard the witnesses and was in a better situation than we are to determine the credibility of the witnesses and the weight that should be attached to their testimony. In connection with the instant contention we have considered the argument of defendant that the testimony of plaintiff is so contradictory that it is worthless for

any purpose of proof.

Defendant contends that the trial court erred in allowing the wife of plaintiff to testify over defendant's objection. From the record it appears that at the time that defendant objected to the wife's testifying counsel for defendant was of the opinion that by reason of the statute a married woman was not competent to testify for her husband under any circumstances. Prior to its amendment in 1935, section 5 of the Evidence and Depositions act, Ill. State Bar Stats. 1935, ch. 51, par. 5, in so far as it applies to the instant case, read as follows:

"No husband or wife shall, by virtue of section 1 of this Act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases * * * or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this Act * * *."

The instant case was tried in 1934. Defendant did not make the point that there was no evidence to show that the wife of plaintiff represented him in any transaction with defendant in reference to the two items in the statement of claim. He now argues that the court erred in permitting her to testify in the absence of such proof. However, the record shows that when the wife was called as a witness for plaintiff, the trial court refused to allow her to testify, and the only testimony given by the wife was offered in rebuttal. We think at that time the court was justified in assuming that there was then evidence tending to show that the wife was acting as agent of her husband in the matter about which she testified. Moreover, defendant, in explaining why he had paid plaintiff $25, at a time when he now claims plaintiff was indebted to him, testified that he gave the wife $25 to buy coal because she told him she was hard up for money. There is no doubt but that she

any purpose of proof.

Defendant contends that the trial court erred in allowing the wife of plaintiff to testify upon defendant's behalf. From the record it appears that at the time that defendant objected to the wife's testifying counsel for defendant was of the opinion that by reason of the section a married woman was not competent to testify for her husband where they are co-defendants. Prior to the enactment in 1932, section 8 of the evidence act, Ill. Revised Stat. 1931, ch. 22, par. 8, in so far as it applies to the instant case, read as follows:

"No husband or wife shall, by reason of anything in this act, be rendered competent to testify for or against or to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after the dissolution, except in cases * * * or in all suits or business transactions where the transaction was had and contracted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other persons may, under the provisions of this act * * *."

The instant case was tried in 1934. Defendant did not make the point that there was no evidence to show that the wife of plaintiff represented him in any transaction with defendant in reference to the two items in the statement of claim. He now argues that the court erred in permitting her to testify in the absence of such proof. However, the record shows that when the wife was called as a witness for plaintiff, the trial court refused to allow her to testify, and the only testimony given by the wife was offered in rebuttal. We think at that time the court was justified in assuming that there was that evidence tending to show that the wife was acting as agent of her husband in the matter about which she testified. However, defendant, in explaining why he had paid plaintiff $25, at a time when no new claims plaintiff was interested in him, testified that he gave the wife $25 to buy coal because she told him she was hard up for money. There is no doubt but that she

was a competent witness to testify in rebuttal of that evidence of defendant. We have purposely refrained from detailing the evidence in this case.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

was a comparative failure as exactly in proportion as the amount of this material of education. It must inevitably materially flow circulating the activities in this case.

The judgment of the educational world at Chicago is affirmed.

REMARKS INTERNAL.

Politics and Prices, 17., summer.

19 H

38105

ETTA WOLF,
(Plaintiff) Appellant,

v.

MICHAEL S. ROTH, CHINA CATERING COMPANY, a corporation, and JOHN DOE,
Defendants.

MICHAEL S. ROTH,
(Defendant) Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

283 I.A. 631

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Etta Wolf, plaintiff, sued Michael S. Roth, China Catering Company, a corporation, and John Doe in replevin. The case was tried by the court, without a jury. The right of property was found in defendant Michael S. Roth (hereinafter called defendant) and his damages were assessed in the sum of $1,500. Plaintiff appeals.

In the spring of 1932 plaintiff was the owner of a building located at the northwest corner of Clarendon and Wilson avenues and the China Catering Company was a tenant in possession of the premises. On March 14, 1932, plaintiff filed a distress for rent suit and judgment was entered in her favor on April 13, 1932, execution issued thereon, and a levy was made on the furniture and equipment of the China Catering Company, a sale was held on April 28, 1932, and defendant, for $1,584, received a bill of sale of the chattels from the bailiff. While the first distress for rent suit was pending a second distress for rent suit was commenced, and plaintiff, on April 29, 1932, commenced the instant replevin suit and obtained possession of the chattels on April 30, 1932. On May 5, 1932, defendant, by bill of sale, sold the chattels to M. J.

John Doe, plaintiff, sued Richard C. Roe, doing business as the Company, a corporation, and John Doe in replevin. The case was tried by the court, without a jury. The right of property was found in defendant Richard C. Roe (hereinafter called defendant) and his damages were assessed in the sum of $1,000. Plaintiff appeals.

In the spring of 1926 plaintiff was the owner of a building located at the northwest corner of Clarendon and Ellrod avenues and the Chine Catering Company was a tenant in possession of the premises. On March 12, 1926, plaintiff filed a distress for rent suit and judgment was entered in her favor on April 12, 1926. execution issued thereon, and a levy was made on the furniture and equipment of the Chine Catering Company, which was held on April 22, 1926, and defendant, for $1,000, received a bill of sale of the chattels from the bailiff. While the first distress for rent suit was pending a second distress for rent suit was commenced, and plaintiff, on April 23, 1927, commenced the instant replevin suit and obtained possession of the chattels on April 30, 1926. On May 8, 1926, defendant, by bill of sale, sold the chattels to R. J.

Roach, and the latter secured possession of them, through a replevin writ, on May 6, 1932. Roach then signed a written release whereby he released plaintiff from all claims or demands whatsoever in connection with the replevin proceedings brought by him.

It is conceded that "the only question involved in this case is the measure of damages." Plaintiff contends, and defendant concedes, that the damages, if any, to be allowed to defendant in the instant suit are governed by section 22, ch. 119, par. 22, Cahill's St. 1933, which reads as follows:

"Judgment for defendant - Retorno habendo - Right acquired pending suit - Alternative.) Sec. 22. If the plaintiff in an action of replevin fails to prosecute his suit with effect, or suffers a non-suit or discontinuance, or if the right of property is adjudged against him, judgment shall be given for a return of the property if such property has been delivered to the plaintiff, and damages for the use thereof from the time it was taken until a return thereof shall be made * * *."

No evidence was offered by defendant to prove any damages for the use of the chattels from April 30, 1932, to May 5, 1932. Plaintiff contends that "defendant can only recover damages for the use of the property from the time it was taken until a return thereof shall be made." In Roberts v. Perrine, 247 Ill. App. 259, which involved a similar proceeding, the court said (pp. 262 & 263):

"The court also erred in the allowance of damages. Section 22 of the act, Cahill's St. ch. 119, par. 22, provides that if the plaintiff in an action of replevin failed to prosecute his suit with effect, or suffers a non-suit or discontinuance, or if the right of property is adjudged against him, judgment shall be given for a return of the property and damages for the use thereof from the time it was taken until a return thereof shall be made, unless the plaintiff shall, in the meantime, have become entitled to the possession of the property, etc. It will be observed that the only damages the court is permitted to allow, in a replevin suit, are damages for the use of the property from the time it was taken until a return thereof shall be made. * * * A replevin bond is for the protection of the defendant and the officer who is to levy the writ, and in case there is a breach of the terms of the bond the defendant in the replevin suit may bring a suit thereon and recover such damages and costs as may have been sustained in consequence of the breach of such condition, under section 25 of the act. In the case at bar the court entered a judgment against appellants for all that could have been recovered in an action upon the bond, whereas by virtue of section 22 of the act, appellee was not entitled to recover, in the replevin suit, any damages other than for the use of the property from the time

Canada, and the latter granted permission to them, through a Canadian agent, to use it, [illegible] [illegible] terms thereby be relieved from all claim or demands whatsoever in connection with the alleged proceedings brought by him.

It is conceded that "the only question involved in this case is the measure of damages." Plaintiff contends, and defendant concedes, that the damages, if any, to be allowed to defendants in the instant suit are governed by section 22, ch. 112, Pub. St. Canada 1906, which reads as follows:

"Interest for detention - Proceeds subject - Right accrued prior - Jurisdiction. 22. If the plaintiff in an action of trespass or other action for a tort, or in an action of replevin, or in an action or claim for damages or compensation, or if the right of recovery in replevin like, judgment shall be given for a return of the property if same be found, or for the value thereof, and damages for the detention from the time it was taken until a return thereof shall be made."

The evidence was offered by defendant to prove any damages for the use of the chattels from April 26, 1922, to May 5, 1922. Plaintiff contends that defendant can only recover damages for the use of the property from the time it was taken until a return thereof shall be made." In Jordan v. Perkins, 207 Ill. 199, 200, which involved a similar proceeding, the court said (pp. 202 & 203):

"The court also erred in the admission of evidence. Section 22 of the act, Cahill's St. ch. 119, par. 22, provides that if the plaintiff in an action of replevin fails to prosecute his suit with effect, or suffers a non-suit or discontinuance, or if the right of recovery in replevin like, judgment shall be given for a return of the property and damages for the use thereof from the time it was taken until a return thereof shall be made, unless the plaintiff shall, in his pleadings, have waived the detention of the property, etc. It will be observed that the only damages for which it provides to allow in a replevin suit, are damages for the use of the property from the time it was taken until a return thereof shall be made. [illegible] a replevin bond is for the protection of the defendant, and the officer who is to levy the writ, and in some cases of the sheriff, and the bond the defendant in the replevin suit may bring a suit against the officer and recover such damages as may have been sustained in consequence of the seizure of such property, section 22 of the act. In the case at bar, the court sustained defendant's objections for all that other costs have been incurred in an action upon the bond, contrary to the rulings of section 22 of the act, applied and not entitled to recover, in the replevin suit, any damages other than for the use of the property from the time

it was taken until a return thereof." (See also Butler v. Mehrling, 15 Ill. 483.)

Defendant offered evidence to the effect that during the five days he was deprived of the use of the chattels he had an opportunity to sell them for $4,000 and he contends that he was damaged by losing the sale, and he argues that defendant's then "use" of the property was to sell it; that plaintiff, by her replevin action, thereby "deprived defendant of the legal 'use' of his property. The trial Court, therefore, properly entered judgment for damages sustained by the defendant caused by his being illegally deprived of the 'use' of his property." It is conceded that the action of the trial court in awarding damages in the amount of $1,500 was based upon defendant's theory.

We will refer to the Illinois cases cited by defendant in support of his position: In National Contract Purchase Corp. v. McCormick, 264 Ill. App. 63, the opinion states (pp. 68-69) that section 22 provides only "for 'damages for the use' of the property from the time it was taken until it is returned," and the court held that the question for determination was whether the trial court arrived at a correct amount in allowing the fair and reasonable value for the use of the property. That case is in accord with Roberts v. Perrine, supra. Alley v. McCabe, 147 Ill. 410, holds (p. 417) that the trial court, under section 22, "had the power to render a judgment in favor of the defendant for damages for the use of the property * * *." Defendant misquotes a statement in James E. Glow & Sons v. Yount, 93 Ill. App. 112, 117, and argues therefrom that that case supports his contention. The correct text of the part misquoted is:

> "Our statute (Hurd's Ch. 119, Sec. 23) provides that when 'judgment is given for the plaintiff in replevin, he shall recover damages for the detention of the property while the same was wrongfully detained by the defendant.'" (Italics ours.)

There plaintiff obtained judgment in the replevin suit and damages were assessed against defendant under section 23 of the Replevin act,

is was based upon a "sound theory." (See also Butler v. Goldblatt, 11 Ill. 486.)

Defendant offered evidence to the effect that during the five days he was deprived of the use of the chattels he had an opportunity to sell them for $4,000 and to contended that he was damaged by having the value, and he argues that defendant's then "use" of the property was to sell it; thus plaintiff, by his replevin action, thereby "deprived defendant of the legal 'use' of his property." The trial Court, therefore, properly entered judgment for damages sustained by the defendant caused by his being illegally deprived of the 'use' of his property." It is contended that the action of the trial court in awarding damages in the amount of $4,000 was based upon defendant's theory.

We will refer to the Illinois cases cited by defendant in support of his position: In Kaiser Contract Improvement Co. v. Kotsiris, 348 Ill. 492, 181 N.E. 224, the appellee claim (p. 494) that section 22 provides only "for 'damages for the use' of the property from the time it was taken until it is returned," and the court said that the question of sufficiency was whether the trial court arrived at a correct amount in fixing the fair and reasonable value for the use of the property. That case is in accord with Kaczko v. Fantina, supra. Also v. Kaczko, 347 Ill. 484, 180 N.E. (p. 414) that the trial court, under section 22, "had the power to render a judgment in favor of the defendant for damages for the use of the property." Defendant misquotes a statement in Jones v. Jones v. Jones, 2d Ill. App. 112, 117, as "deprived defendant of the legal use of his property in his possession. The correct text of the pertinent language is:

"For statutory (Ford's Ill. 112, sec. 17) provides that when 'judgment is given for the one plaintiff in replevin, he shall receive damages for the detention of the property, with the same as originally assessed by the defendant.'" (Italics ours.)

There plaintiff obtained judgment in the replevin suit and damages were assessed against defendant under section 22 of the replevin act.

which provides that if judgment is given for plaintiff in replevin he shall recover damages for retention of the property. In Stein v. Traeger, 218 Ill. App. 122, the court did state that pursuant to section 22 judgment could be entered "for whatever damages the evidence showed the defendant had suffered by reason of the wrongful taking of the property," but we are satisfied that the quoted language was inadvertently used and that the court intended to state that defendant could recover whatever damages were proven under section 22. McCabe v. Chicago and Northwestern Ry. Co., 215 Ill. App. 99, involved a suit to recover damages for delay in the delivery of an automobile shipped by plaintiff over defendant railroad. Pace v. Neal, 92 Ill. App. 416, involved a suit upon a replevin bond. Wheeler & Wilson Mfg. Co. v. Barrett, 172 Ill. 610, involved an action of trespass on the case for wrongfully taking plaintiff's machine.

Section 22 must not be confused with section 25 of the act, which concerns damages when a suit is brought on the replevin bond. It seems plain to us that section 22 limits recovery to damages for use of the chattels during the period the defendant was deprived of their use, while section 25 permits a defendant to maintain an action on the replevin bond for the recovery of all damages and costs that may have been sustained as a result of the breach of the condition of the bond.

In view of the plain language of section 22 we have not deemed it necessary to notice several decisions of other states also cited by defendant. The instant contention of plaintiff must be sustained. If defendant believes that the testimony he offered to the effect that he lost a sale of the chattels during the five days' period is credible, he has a right to file a suit on the replevin bond.

In the instant case defendant had the burden of proving that he sustained damages under section 22, and he failed in that regard, for the reason, apparently, that the chattels consisted of second-hand

which provides that if judgment is given for plaintiff in replevin he shall recover damages for detention of the property. In Klein v. Tanner, 212 Ill. App. 128, the court did state that pursuant to section 22 judgment could be entered "for whatever damages the evidence showed the defendant had suffered by reason of the wrongful taking of the property," but we are satisfied that the quoted language was inadvertently used and that the court intended to state that defendant could recover damages were proved under section 22. Hudson v. Chicago and Northwestern Ry. Co., 212 Ill. App. 99, involved a suit to recover damages for delay in the delivery of an automobile shipped by plaintiff over defendant railroad. Cole v. Ball, 32 Ill. App. 414, involved a suit upon a replevin bond. Chester v. Miller Bros. Co. v. Barrett, 120 Ill. App. 414, involved an action of trespass on the case for wrongfully taking plaintiff's machine.

Section 22 must not be confused with section 20 of the act, which permits judgment when a writ is sued on the replevin bond. It seems plain to us that section 22 limits recovery to damages for use of the chattels during the period the defendant was deprived of their use, while section 20 permits a defendant to maintain an action on the replevin bond for the recovery of all damages and costs that may have been sustained as a result of the breach of the condition of the bond.

In view of the plain language of section 22 we have not deemed it necessary to notice several decisions of other states cited by defendant. The instant contention of plaintiff must be sustained. If defendant believes that the detinuing be offset to the effect that he lost a sale of the chattels during the five days' period it credibly, he has a right to file a suit on the replevin bond.

In the instant case defendant had the burden of proving that he sustained damages within section 22, and he failed in that regard, for the reason, apparently, that the chattels remained at point-blank

restaurant fixtures that were not in use at the time that plaintiff obtained possession of them, nor were they used by plaintiff during the five days that she held possession of them.

That part of the judgment order of the Superior court of Cook county entered July 11, 1934, which awards damages in favor of defendant Michael S. Roth and against plaintiff, Etta Wolf, for the sum of $1,500 and costs, is reversed.

THAT PART OF JUDGMENT ORDER ENTERED JULY 11, 1934, WHICH AWARDS DAMAGES IN FAVOR OF DEFENDANT MICHAEL S. ROTH AND AGAINST PLAINTIFF, ETTA WOLF, FOR $1,500 AND COSTS, REVERSED.

Sullivan and Friend, JJ., concur.

[illegible] Firpoyen that were not in use at the time that plaintiff obtained possession of them, nor were they used by plaintiff during the five days that he held possession of them.

That part of the judgment order of the superior court of Yuba county entered July 11, 1921, which awards damages in favor of defendant Elmore G. Yeck and against plaintiff, Jeff, for the sum of $1,[illegible] and costs, is reversed.

[illegible]

Hutchins and Trinkle, J.J., concur.

20 H

38121

VAN SCHAACK-MUTUAL, INC.,
a corporation,
Appellee,

v.

LAFAYETTE DRUG COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

283 I.A. 631[2]

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

LaFayette Drug Company, a corporation, defendant, appeals from a judgment confirming a judgment by confession against it upon a judgment note. Defendant filed a petition to open the judgment, which alleges that defendant's corporate name had been inserted in the note by an unauthorized drug clerk, that the officers of defendant corporation whose purported signatures appear upon the note had no authority to execute the note, and that defendant had received no consideration for the note, which represented a personal account due plaintiff from one of defendant's officers. Upon defendant's motion the judgment was opened and leave was given it to appear and defend. Thereafter, by leave of court, defendant filed an affidavit of merits in which the defenses set up in the petition were amplified, and the additional defense was raised that the note did not bear the genuine signature of John S. Gilrain, president of defendant corporation, and that his purported signature to the note was a forgery.

Defendant contends that the trial court erred in overruling its motion for a change of venue from Judge Lyle. On January 4, 1935, defendant mailed to the attorneys for plaintiff a notice to the effect that when the case was called for trial

[illegible]

[illegible]
a corporation,
Appellee,

v.

[illegible]
a corporation,
Appellant.

[illegible]

[illegible]
[illegible]

Mr. Justice Dufficy delivered the opinion of the court.

Lafayette Bank Company, a corporation, defendant, appealed from a judgment entered against it upon a judgment note. Defendant filed a petition to open the judgment, which alleges that defendant's corporate name had been inserted in the note by an unauthorized bank clerk, that the officers of defendant corporation never purported signature appear upon the note had no authority to execute the note, and that defendant had received no consideration for the note, which represented a personal account the plaintiff took out of defendant's affairs. Upon defendant's motion the judgment was opened and leave was given it to appear and defend. Thereafter, by leave of court, defendant filed an affidavit of merits in which the defenses set up in the petition were amplified, and the additional defense was raised that the note did not bear the genuine signature of John E. Gilstrin, president of defendant corporation, and that his purported signature to the note was a forgery.

Defendant contends that the trial court erred in overruling its motion for a change of venue from Jackson Ill. On January 4, 1933, defendant replied to the accounts for plaintiff a notice to the effect that when the case was called for trial

on January 7 defendant would request a change of venue from Judge Lyle. Appended to the notice was a copy of the verified petition to be presented in support of the motion. The petition was signed by Francis B. Grant as one of the officers of defendant corporation and its duly authorized agent. In it Grant stated, inter alia, that he feared defendant would not receive a fair and impartial trial from the judge before whom the case was pending because that judge was "prejudiced against him, the petitioner."

When the petition was presented to the trial court plaintiff objected to the granting of the motion for a change of venue and the objection was sustained. Counsel for defendant, after stating to the court that Grant and the notary public who acknowledged the petition were present, moved for leave to amend the petition on its face, so that it would read, as amended, that the trial judge was prejudiced against defendant corporation. The trial court, upon objection by plaintiff, refused to allow the amendment and again denied the motion for a change of venue. The court's decision was based upon the sole ground that the petition alleged prejudice against the petitioner only. It appears from the record that the clerk of the Municipal court supplies to attorneys a printed form for a petition for a change of venue, and it is apparent that the inclusion of the word "him" in the petition was not intentional, and was caused by the use of the printed form by defendant. The petition shows that it was filed by an officer and agent of the corporation and in its behalf, and it alleges that the petitioner fears that the defendant would not receive a fair and impartial trial.

Defendant has strenuously argued that the petition sufficiently complied with the Venue act, and while we are aware that it is the settled rule of law in this state that provisions of that act "should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as

on January 7 defendant would request a change of venue from Judge Lyle. Upon being to the notice was a copy of the written petition to be presented in support of the motion. The petition was signed by Francis R. Stout as one of the officers of defendant corporation and its duly authorized agent. In it Stout stated, inter alia, that he feared defendant would not receive a fair and impartial trial from the judge before whom the case was pending because that judge was "prejudiced against him, the petitioner."

Then the petition was presented to the trial court plaintiff objected to the granting of the motion for a change of venue and the objection was sustained. Counsel for defendant, after stating to the court that from the moment judge had acknowledged the petition was presented, moved for leave to amend the petition so its form, so that it would read, as amended, that the trial judge was prejudiced against defendant corporation. The trial court, upon objection by plaintiff, refused to allow the amendment and again denied the motion for a change of venue. The court's decision was based upon the sole ground that the petition alleged prejudice against the petitioner only. It appears from the record that the clerk of the Municipal court supplied to attorneys a printed form for a petition for a change of venue, and it is apparent that the inclusion of the word "him" in the petition was not intentional, and was caused by the use of the printed form by defendant. The petition shows that it was filed by an officer and agent of the corporation and in its behalf, and it alleges that the petitioner fears that the defendant would not receive a fair and impartial trial.

Defendant has strenuously argued that the petition sufficiently complied with the Illinois act, and while it is true that it is the settled rule of law in this state that provisions of that act "should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as

not to defeat the right attempted to be attained therein," (People v. Scott, 326 Ill. 327, 341) and that public policy favors changes in venue when not requested for delay, we do not deem it necessary to pass upon the instant point. It is the policy of our law (Amendments & Jeofails, ch. 7, par. 1) to permit amendments in any process, pleading or proceeding, either in form or substance, "for the furtherance of justice on such terms as shall be just * * *." Defendant, in the instant case, was not seeking a delay: indeed, the cause proceeded to trial, without objection by defendant, within a few minutes after the motion was denied. Plaintiff relies upon one case in support of the trial court's action, Bartkowski v. Albert Hoefeld, Inc., 226 Ill. App. 198, but there it appears that the defendant was determined to bring about, if possible, an unwarranted delay of the trial of the cause. Where such purpose appears, the courts are more inclined to enforce, strictly, the requirements of the act. In the instant case the trial court abused its discretion in refusing to allow defendant to amend the petition. Moreover, after a careful consideration of the entire record, we have reached the conclusion that justice will be best served by a retrial of the cause.

The judgment order of January 7, 1935, of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Sullivan and Friend, JJ., concur.

not to defend the right allegedly to be violated therein." (Jordan v. Bush, 280 Ill. 347, 353) and that public policy favors changes in venue when not requested for delay, we do not feel it necessary to pass upon the instant point. It is the policy of our law (Hawkins & Dwyer, ch. 7, par. 1) to permit amendments in any process, pleading or proceeding, either in form or substance, "for the furtherance of justice on such terms as shall be just." Defendant, in the instant case, was not pressing a dilatory tactic, the cause proceeded to trial without objection by defendant, within a few minutes after the motion was denied. Identical rulings upon one case in support of the trial court's action, Kartkowski v. Edward Hospital, Inc., 320 Ill. App. 295, but there it appears, that the defendant was determined to bring about, if possible, an premature delay of the trial of the cause. Where such purpose appears, the courts are more inclined to welcome, strictly, the requirements of the act. In the instant case the trial court showed the discretion in refusing to allow defendant to amend the petition. Moreover, after a careful consideration of the evidence herein, we have reached the conclusion that justice will be best served by a retrial of the cause.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND REMANDED.

Sullivan and Friend, JJ., concur.

21 A

38132

ELMER M. LEESMAN and ERWIN W. ROEMER, Appellees,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
ROBERT E. LITTLE, Appellant.	283 I.A. 631[3]

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant in an action of the fourth class in the Municipal court of Chicago. The case was tried by the court without a jury, the issues were found against defendant, and plaintiffs' damages were assessed at the sum of $500. Defendant appeals from a judgment entered upon the finding.

Plaintiffs' amended statement of claim alleges that in 1930 they were employed by defendant to represent him and Chicago Title and Trust Company as attorneys at law in two cases, one pending in the Circuit court and the other in the Superior court of Cook county; that defendant agreed to pay plaintiffs the reasonable value of their services rendered and to be rendered in connection with said causes; that pursuant to the contract of hire they rendered all necessary legal services to defendant in connection with the handling of the two law suits; that they negotiated a settlement of the second law suit at the instance and request of defendant; that they appeared in court on behalf of defendant and said Chicago Title and Trust Company in the second cause and rendered services to defendant that consumed in excess of ten days' time "and are reasonably worth One thousand dollars;" that at the time of the negotiation of the

[illegible]

[illegible] K. [illegible] and
[illegible] T. [illegible],
Appellees,

v.

[illegible] Appellant.

[illegible] CHICAGO TITLE AND TRUST CO.

[illegible] COURT OF [illegible].

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant in an action of the tort class in the municipal court of Chicago. The case was tried by the same element a jury, the issues were found against defendant, and plaintiffs' damages were assessed at the sum of [illegible]. Defendant appeals from a judgment entered upon the finding.

Plaintiffs' amended statement of claim alleges that in 1930 they were employed by defendant to represent him and Chicago Title and Trust Company in attorney at law in two cases, one pending in the Circuit court and the other in the superior court of Cook county; that defendant agreed to pay plaintiffs the reasonable value of their services rendered and to be rendered in connection with said causes; that pursuant to the contract of hire they rendered all necessary legal services to defendant in connection with the foreclosing of the tax lien; that they negotiated a settlement of the second law suit at the instance and request of defendant; that they appeared in court on behalf of defendant and said Chicago Title and Trust Company in the second cause and rendered services to defendant that consumed in excess of ten days' time "and are reasonably worth One thousand dollars;" that at the time of the negotiation of the

said settlement plaintiffs and defendant, in order to promote the settlement, agreed that plaintiffs would accept from defendant, in full payment of their services rendered to him, the sum of $500, and defendant agreed to pay said sum to plaintiffs in full for their services to him; that defendant later found that he was unable to raise the necessary money to carry through the settlement and therefore was unable to consummate it; that plaintiffs rendered a bill to defendant for said services in the amount of $500, on January 10, 1931, which defendant agreed to pay as soon as he was financially able, and not later, in any event, than the termination of the appeal by him and Chicago Title and Trust Company in the first case; that that appeal has now been terminated in defendant's favor and the proceeds of said litigation recovered by defendant are now in the hands of Chicago Title and Trust Company, as trustee, for defendant, and that there is now due and owing from defendant to plaintiffs the sum of $500, together with interest thereon at the rate of five per cent from January 10, 1931. Defendant's affidavit of merits is as follows:

"Defendant denies that in the year 1930 plaintiffs were employed by the defendant to represent him and the Chicago Title & Trust Company as attorneys at law in connection with the case of the City of Chicago in Trust for the Use of Schools, v. Chicago Title & Trust Company, et al, then pending in the Circuit Court of Cook County, Illinois, as case No. B-176150; defendant states that in so far as the case of Clyde W. Musgrave et al. v. Charles F. Kobey, et al then pending in the Superior Court of Cook County, as case No. 483007, plaintiffs suggested that the defendant (who is an attorney at law) appear in said case in said Superior Court and defend said case himself and that the defendant should do all the work in said case but could use the names of the plaintiffs as attorneys of record and that no promise was made to the plaintiffs by this defendant to pay said plaintiffs any sum or sums of money in connection with the use of their names in said case.

"Defendant denies that he entered into any contract to hire the said plaintiffs as is alleged in said Amended Statement of Claim. Defendant further states that the plaintiffs agreed to negotiate a settlement on a contingent basis of the matters involved in said Superior Court case and plaintiffs were only to be paid if said settlement was acceptable to this defendant and fully consummated; that plaintiffs submitted a proposed settlement which was not acceptable to this defendant and that he so notified the plaintiffs; that said proposed settlement was not consummated

said settlement plaintiffs not returned, in order to provide the settlement, injure that plaintiffs would benefit from defendant's full payment of their arrearage received in 1934, 1935, and defendant agreed to pay said sum to plaintiffs in full for their arrearage to time; that defendant later found that he was unable to raise the necessary money to carry through the settlement and therefore was unable to consummate it; that plaintiffs received a bill to defendant for said services in the amount of $500, on January 17, 1937, which defendant agreed to pay as soon as he was financially able, and not later, in any event, upon the termination of the appeal by him and Chicago Title and Trust Company in the first case; that appeal has now been terminated in defendant's favor and the proceeds of said litigation recovered by defendant are now in the hands of Chicago Title and Trust Company, as trustee, for defendant, and that there is now due and owing from defendant to plaintiffs the sum of $500, together with interest thereon at the rate of five per cent from January 16, 1937. Defendant's affidavit of merits is as follows:

"Defendant denies that in the year 1930 plaintiffs were employed by the defendant to represent the said the Chicago Title & Trust Company as attorneys at law in connection with the sale of the City of Chicago in front for the use of landowners, v. Chicago Title & Trust Company, et al. then pending in the Circuit Court of Cook County, Illinois, on case No. E-19239; defendant denies that on or for or the sum of Ninty v. Chicago et al. v. Chicago T. Company, et al then pending in the Superior Court of Cook County, on case No. 40307, plaintiffs represented that the defendant (who is an attorney at law) appears in said cause in said Superior Court and defend said suit vigorously and that the defendant should do all the work in said case but should the manner of the plaintiffs as attorneys at record and that no payment was made to the plaintiffs by this defendant in any such plaintiffs any sum on account of money in connection with the use of their names in said cause.

"Defendant denies that he referred this our business by plaintiffs as alleged in said Amended Statement of Claim. Defendant further states that the plaintiffs agreed to compromise a settlement on a contingent basis of the matters involved in said Superior Court case and plaintiffs, sole only to be paid if said settlement was acceptable to this defendant and fully reasonably that plaintiffs submitted a proposed settlement which was not acceptable to this defendant and that he so notified the plaintiffs; that said proposed settlement was not consummated

and therefore plaintiffs were not entitled to any compensation; that the plaintiffs never on any occasion appeared on behalf of this defendant in said second cause, but on the contrary the defendant herein acted as his own counsel in said cause; denies that the plaintiffs rendered services to this defendant other than on the contingent basis above set forth; denies that the said services consumed an excess of ten days; time and denies that they are reasonably worth $1,000.00; that if plaintiffs did use any time in connection with conferences or otherwise, it was not at this defendant's request and was without his permission or knowledge.

"Defendant denies that he agreed in order to promote said settlement or any settlement that plaintiffs would receive from defendant the sum of $500.00 for alleged services and denies that this defendant agreed to pay said sum to plaintiffs for said services.

"Defendant denies that plaintiffs rendered a bill to defendant for said services in the amount of $500.00 on January 10, 1931, and the defendant further denies that he agreed to pay said amount or any other amount; denies that there is now due and owing from this defendant to said plaintiffs the said sum of $500.00, together with interest thereon, or any other sum or sums whatsoever."

Plaintiffs and defendant are attorneys at law, practicing at the Chicago bar. As is usual in cases of this character, considerable feeling seems to have been engendered. Defendant states his position as follows: "Defendant's theory of the case is that he never retained plaintiffs to represent him in the two cases, one in the Superior Court of Cook County and one in the Circuit Court of Cook County except that plaintiffs agreed to negotiate a settlement on a contingent basis of the matters involved in the Superior Court case, that the settlement was not effected by plaintiffs and therefore defendant owed plaintiffs nothing; that the plaintiffs on the trial failed to prove any contract with defendant for the performance of services, and failed to prove the value of any services or that any services proven to have been performed by them were of the value of $500.00 or any other or different amount, or any amount whatever; that plaintiffs during the trial were guilty of misconduct prejudicing the Court in their favor, and defendant did not have a fair trial in the Municipal Court."

Defendant contends that plaintiffs failed to establish

and therefore plaintiffs were not entitled in any recapitulation that the plaintiffs were not asserting expressly or implicitly of this interest in said stock, but on the contrary the defendant herein after on his own account in said account stating that the plaintiffs received interest to this interest which then on the settlement book showed not finding taken that the said services commenced on account of the days, time and income that they are reasonably worth; it was in the plaintiffs did not know or consulted with defendant or employees, it was not at this defendant's request and was without his permission or knowledge.

"Defendant denies that he agreed in order to promote said settlement or the contention that plaintiffs would receive from defendants the sum or interest for income and during that this information agreed to pay will was in plaintiffs for said services.

"Defendant denies that plaintiffs rendered a bill to defendants for said services in the amount of $[illegible] on January 3rd, 1924, and the defendant further denies that he agreed in any said manner or any other manner during that there is due the said plaintiffs this information to said plaintiffs the sum of [illegible], jointly with interest thereon, or any other sum or sums whatsoever."

"Plaintiffs and defendant are strangers at law, practicing at the Toledo bar. As\[illegible]ed in cases of this character, contingency fees being in vogue regularly. Defendant's position on follows: "Defendant's theory of the case is that he never retained plaintiffs to represent him in the two cases, one in the superior court of Cook County and one in the Circuit Court of Cook County except that plaintiffs agreed to negotiate a settlement on a contingent basis of the matters involved in the Superior Court case, that the settlement was not effected by plaintiffs and therefore defendant owed plaintiffs nothing; that the plaintiffs on the actual trial failed to prove any contract with defendant for the performance of services, and failed to prove the value of any services or that any services proven to have been performed by them were of the value or [illegible] or any other or different amount, or any amount whatsoever; that plaintiffs during the trial were guilty of unethical practices in the Court in their favor, and defendants did not have a fair trial in the municipal Court."

Defendant contends that plaintiffs failed to establish

their case by a preponderance of the evidence. He argues that because plaintiffs took part in the trial as attorneys their testimony should be given little weight. It has never been held in this state that it is unlawful for an attorney connected with a case to appear as a witness for his client, although it has been held that where he does so testify without withdrawing from the case his testimony should be given little weight; but in the instant case Leesman and Roemer were plaintiffs and they testified in their own behalf and their interest was that of a party to the litigation, and the trial court undoubtedly considered that interest in passing upon their credibility and in determining the weight that should be attached to their testimony. Defendant, who testified in his own behalf, also took some part in the conduct of the case, and he is, therefore, hardly in a position to complain of plaintiffs in that regard. After a careful examination of the evidence we are satisfied that we would not be justified in holding that the finding of the trial court was against the manifest weight of the evidence. The trial court saw the witnesses and had superior opportunities to determine their credibility and the weight that should be attached to their testimony. The trial court was undoubtedly influenced in his finding by certain admissions made by defendant. The latter testified: "I waited for them to send me a bill, I thought they might send me a bill for about twenty-five or fifty dollars and I was going to pay them up to a hundred dollars; but I didn't receive a bill. * * * I considered that I might owe them as much as fifty dollars. * * * I expected they would send me a bill for twenty-five or fifty or possibly a hundred dollars, which I would have been willing to pay." These admissions were significant in view of the fact that defendant alleged in his verified pleadings that he did not owe plaintiffs anything.

We find no merit in defendant's contention that he did

that was by a preponderance of the evidence. We suppose that Defendant plaintiffs had part in the trial, he attempts that testimony should be given little weight. It was error that in this state that it is unlawful for an attorney conducted with a case to appear as a witness for his client, although it has been held that where he does so insofar without withdrawing from the case his testimony should be given little weight but is not incompetent. Lawrence and Tarver were plaintiffs and they testified in their own behalf and their testimony was that of a party in the litigation, and the trial court instructed unauthorized that testimony in proper weight credibility and in determining the weight that should be attached to their testimony. Defendant, who testified in his own behalf, also took some part in the conduct of the case, and his testimony, insofar in a position to complete of plaintiffs is that regard. After a careful consideration of the evidence we are satisfied that it would not be justified in holding that the finding of the trial court was against the manifest weight of the evidence. The trial court saw the witnesses and had superior opportunities to determine their credibility and the weight that should be attached to their testimony. The trial court was unmistakably influenced in his finding by certain admissions made by defendant. The latter testified: "I wanted for them to send me a bill, I thought they might send me a bill for some twenty-five or fifty dollars and I was going to pay them up to a hundred dollars; I didn't receive a bill. * * * I remembered that - might we then as much as fifty dollars. * * * I expected they would send me a bill for twenty-five or fifty or possibly a hundred dollars, which I would have been willing to pay." These admissions were significant in view of the fact that defendant alleged in his verified pleadings that he did not owe plaintiffs anything.

We find no merit in defendant's contention that he did

not have a fair trial. While he first demanded a jury trial, the case was finally submitted to the trial court at his instance.

There is no merit in defendant's contention that "the Court erred in refusing to permit defendant to bring in expert witnesses to prove value of plaintiffs' services." At the conclusion of the evidence and after the trial court had denied defendant's motion, made at the close of all the evidence, for a finding and judgment in his favor, and after the court had stated that he was of the opinion that there should be a judgment for plaintiffs, defendant, in person, moved the court "for the right to bring in one or more expert witnesses to testify as to the fair and reasonable value of the alleged legal services claimed to have been rendered by Leesman and Roemer." At that stage of the proceedings the granting or refusing of the motion rested in the sound discretion of the trial court, and we certainly would not be justified in holding that he abused his discretion in that regard.

Defendant contends that plaintiffs "illegally charged exorbitant fees." We find no merit in that contention.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

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38146

PEOPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts,
Plaintiff,

v.

GARFIELD STATE BANK,
Defendant.

CLAY NESS, Administrator of the Estate of EZRA NESS, Deceased, Intervening Petitioner,
Appellant.

JOHN E. SULLIVAN, Receiver of GARFIELD STATE BANK, Respondent,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 631

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Clay Ness, administrator of the estate of Ezra Ness, deceased, appeals from an order denying his intervening petition praying that his claim for $3,616.42 against the receiver be considered as trust funds in the hands of Garfield State Bank.

The receiver of the bank answered the petition, admitting that there was on deposit in the checking account of Ezra Ness in the Garfield State Bank at the time of his decease a balance of $3,636.77, but denying that said deposit was a trust fund, as claimed. The cause was referred to a master, who recommended that the claim be denied as a preferred one and that it be allowed as a general claim and paid in the due course of administration. The chancellor entered a decree in accordance with the recommendations of the master.

The master found that the Garfield State Bank suspended

[illegible]

[illegible]

[illegible]

business on or about June 11, 1931, and that John T. Sullivan was appointed receiver thereof; that during his lifetime Ezra Hess was a resident of Weyerhaeuser, Wisconsin, and did business in Chicago as well as in other cities outside of Wisconsin; that he died about December 20, 1930, and on March 2, 1931, petitioner was duly appointed administrator of his estate by the County court of Rusk county, Wisconsin; that letters of administration, pursuant to the statute of Wisconsin, were issued to the petitioner by said court, on March 2, 1931, and that they are still in full force and effect; that Ezra Hess, at the time of his decease, was the owner of $3,646.42, which was on deposit in a checking account, subject to checks drawn by him, in the Garfield State Bank; that on March 21, 1931, as said administrator, petitioner went to defendant, Garfield State Bank, and then and there, in accordance with the previous request of the officers of said bank, presented to the officers and persons in charge of the bank a duly certified copy of the letters of administration issued to him as administrator of the estate of Ezra Hess, deceased, and duly identified himself as the person to whom said letters were issued, and attempted to withdraw the $3,646.42 from the bank, and then and there offered to execute any necessary check, document or other paper and any receipt required by said bank, or its officers, as such administrator of the estate of Ezra Hess, deceased, but that the officers and persons in charge of said bank absolutely refused to pay over to the petitioner, as such administrator of said estate, said sum or any part thereof; that the said officers and persons stated to petitioner, as the grounds for their refusal, that they would not pay said money to any administrator except one appointed in ancillary proceedings in the estate of the said deceased, by the Probate court of Cook county, Illinois; that the cash on hand coming into the receiver's hands upon the closing of the Garfield State Bank

was more than sufficient to pay in full all claims or petitions for preferred or prior claims filed prior to July 8, 1932, and that the claim of petitioner was filed prior to that time; that the Garfield State Bank had, from and after December 30, 1930, to and including June 12, 1931, cash on hand equal to or in excess of the amount of cash turned over to the receiver on the date of the closing of the said bank.

The theory of petitioner is "that Section 43 of the Administration Act vests in a non-resident domiciliary administrator all rights and powers of his intestate over personal property; that the power to sue expressly given in said act necessarily implies the power to make a valid demand; that no lien could have existed upon the funds in the hands of the bank; that the refusal of the bank to pay over the funds altered the relationship between the bank and the petitioner from debtor-creditor to trustee-cestui; that petitioner is therefore entitled to a preferred claim in the assets of the bank."

The theory of the receiver is "that the action of the Garfield State Bank, in refusing to pay the funds in question to the petitioner, was under the circumstances, not unwarranted or unreasonable; that the relationship between the petitioner and the Garfield State Bank at the time of the transaction complained of, was that of debtor and creditor and that the negotiations had on March 31, 1931, between petitioner and the bank did not alter or change this relationship of debtor and creditor and conferred upon the intervening petitioner no right to priority of payment over general creditors of the bank."

The petitioner, appellant, contends that "a foreign domiciliary administrator may collect debts of his intestate in this state," and that "the action of a bank in refusing to pay over the funds of a non-resident intestate to the domiciliary administrator is unreasonable and contrary to law;" that "a bank's unreasonable refusal of a sufficient demand entitles the demanding creditor to a preferred claim in the

was more than sufficient to pay in full all debts or politics for production or price claims filed prior to Feb. 2, 1934, and that the claim of politics was filed prior to that time; that the Dartrix claim had not, from any other therefor 31, 1934, to not including June 30, 1934, such so-called event to be in lieu of the amount of such notes over to the receiver on the date of the closing of the old book.

The theory of politics is "that Section 62 of the Bankruptcy Act vests in a non-resident bankruptcy administrator all rights and powers of the bankrupts over preferred creditors; that the power to use [illegible] gives to such representatives implies the power to make a valid demand; that no time could have existed when the place to the books of the bankrupt that the refusal of the bank to pay over the funds violated the relationship between the bank and the politics from debtor-creditor to trustee-cestui; that politics is therefore entitled to a preferred claim in the hands of the bank."

The theory of the receiver is "that the notes of the Dartrix State Bank, in relation to pay the funds in question to the politics, was under the circumstances, not inconsistent or misrepresenting that the relationship between the politics and the Dartrix State Bank at the time of the transaction complained of, was one of debtor and creditor and that the negotiations had on March 31, 1934, between politics and the bank did not claim it (though this relationship of debtor and creditor was asserted upon the intervening bankruptcy as right to priority of payment over general creditors of the bank."

The politics, contends, that "a foreign commissioner administrator may collect debts of his insolvents in this state," and that "the action of a bank in refusing to pay over the funds of a non-resident insolvents to the commissioner administrator is unwarrantable and contrary to law" that "a bank's unwarrantable refusal of a politics demand collides the commissioner-creditor to a preferred claim in the

assets of the bank upon liquidation." The receiver, appellee, concedes that under the administration act the petitioner, as foreign domiciliary administrator, could collect the debts of his intestate in this state upon certain conditions and under certain circumstances, but argues that it does not necessarily follow that because the bank might ultimately have been required to pay over the fund in question to the petitioner its conduct in refusing to pay voluntarily, except upon certain conditions, was unreasonable and contrary to law. The receiver further argues that the bank did not deny liability, but merely insisted upon a course of procedure which the bank considered necessary for its protection; that the demand was made on March 21, 1931, and that the evidence does not disclose that any further steps were taken by petitioner until after the closing of the bank, on June 11, 1931.

Each side has argued the question as to whether or not the officers of the bank acted in complete good faith in refusing to pay over to petitioner the money in Ezra Hess' account. They have also argued the further question as to whether or not a foreign domiciliary administrator has the right to collect debts of his intestate in this state. For the purposes of this appeal we will assume that the administrator had such right and that the petitioner made a proper demand upon the bank, while it was still open and doing business, for the payment of the amount in the checking account of Ezra Hess, and that the reason given by the bank for refusing to honor the demand was not a good one. In People ex rel. Nelson v. Chicago Bank of Commerce, 332 Ill. App. 155, recently decided by this division of the court, we held that a demand and refusal did not operate to create a trust in favor of the petitioner in that case, although the circumstances present indicated that the assistant cashier of the bank must have known of the bank's insolvent condition at the time the petitioner demanded her money, and that he, for several hours, pursued a course

of conduct which was calculated to avoid payment until the bank had closed its doors. We adhere to our holding in that case, and the contention of petitioner in the instant proceeding that the funds in the bank constitute trust funds, therefore, cannot be sustained. In addition to the authorities cited in People ex rel. Nelson v. Chicago Bank of Commerce, supra, see People ex rel. Barrett v. The West Side Trust & Savings Bank, 250 Ill. App. 629 (Abst.), recently decided by the first division of the court.

The decree of the Circuit court of Cook county is affirmed.

[illegible]

Sullivan and Friend, JJ., concur.

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38158

MARGARET FORSTER,
Appellee,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

283 I.A. 632

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action on a life insurance policy, in the sum of $1,000, issued by defendant on the life of Walter Forster, in which plaintiff is the beneficiary. A jury returned a verdict in favor of plaintiff and against defendant in the sum of $1,000. Defendant appeals from a judgment entered upon the verdict.

The declaration alleges, in substance, that on November 15, 1910, defendant issued and delivered a life insurance policy on the life of Walter Forster in which it promised to pay to plaintiff, wife of Forster, the sum of $1,000 upon receipt of due proof of the death of Forster; that Forster departed this life on or before September 1, 1931, "that is to say, the said Walter Forster on to wit: September 1st, 1924, who had always been a kind, loving and considerate husband, disappeared from his home wounded, sick and in a condition of ill health, leaving plaintiff and her two minor children in a destitute condition. Plaintiff further avers that she has never heard from him, directly or indirectly since said time, nor been able to get any information concerning him or his whereabouts or whether he be living or dead, although she avers that she has made and caused to be made all due, reasonable and diligent search and efforts to find the said Walter Forster and his whereabouts and any

information concerning him, but has not been able at any time and could not and cannot find him, his whereabouts or any other information concerning him;" that on October 3, 1927, she reported the fact of his disappearance to defendant, and on April 28, 1933, she made application for payment of the policy; that all its terms have been complied with by plaintiff but that defendant has refused to pay the policy or any part thereof, to the damage of plaintiff in the sum of $1,000, etc. Defendant filed the plea of the general issue. Neither side makes any point upon the pleadings.

Defendant conceded that Walter Forster disappeared from his home on September 1, 1924, and has not returned or been heard from since that date, and the sole defense was that his disappearance and continued absence is fully explained and therefore no presumption of death has arisen.

Premiums on the policy were paid in full for twenty-three years. After Forster disappeared plaintiff continued to pay the premiums until the latter part of 1933. Forster seems to have been industrious and able. He had been superintendent of the Acme Steel Goods Company, and foreman at Albright-Nellen Company and Nelson Morris's. His family, in addition to his wife, consisted of two young daughters, of whom he was very fond. He was a good provider. That he drank heavily at times is conceded. At the time of his disappearance he had lived with his family for nearly twenty years. A number of years after the marriage plaintiff secured a decree against him for separate maintenance, on the grounds of drunkenness and cruelty. The separation lasted only a short time, and it clearly appears that after he returned to the home the family was a happy one. On September 1, 1924, he left home at 7:15 a.m. to go to work, but he never returned there. A man named Martin was shot in a saloon about 5:30 p.m. the same day. There were eyewitnesses to the shooting but none was called as a witness in the instant proceeding. Defendant

introduced hearsay evidence to the effect that Forster shot Martin, and upon this character of proof argues that Forster murdered Martin and for that reason became a fugitive and has remained such to escape the electric chair. It was not the fault of the trial court that this incompetent evidence was admitted, as counsel for plaintiff seems to have tried his case upon the theory of allowing defendant to introduce any kind of evidence it desired. But it would not be possible to determine even from the hearsay evidence just what occurred at the time of the shooting. While defendant saw fit to use hearsay evidence, it objected to plaintiff's proving by hearsay evidence that Forster was also shot in the saloon and thereafter had blood poisoning. A police officer who had no knowledge of the shooting, save by hearsay, took out a warrant for the arrest of Forster, but it does not appear that the latter was ever indicted for the shooting of Martin. That Forster at the time of his disappearance was fearful of being arrested appears from the evidence. Shortly after his disappearance he wrote his sister a letter and inclosed in the envelope a letter to his wife. No one, so far as the evidence shows, thereafter saw him or heard from him. Plaintiff, after the disappearance, went to the chief of police and members of the police department and asked them to try and locate her husband, and they promised they would do all they could in the matter, and from the evidence of a police officer, called by defendant, it appears that they "put on a very extensive search to find him. They search not only in this state but in every state in the Union or in any place they have any inclination or information relative to where he is or might be. They use every means in their power to try and locate the man. They never did locate him." Plaintiff notified the defendant of the disappearance of her husband, and its representative told her that they would do all in their power to find him. At the time of the trial of this case, in December, 1934, nothing had been heard from Forster,

interested society witness to the effort that Detroit has spent during and upon this character or great organ-new Jersey [illegible] during and for that reason Detroit a fighting and the [illegible] work of making the electric chair. It was not the fault of the [illegible] that this immoral evidence was admitted, so anxious for publicity seems to have tried hard upon the theory of electric [illegible] he introduce any kind of evidence it desired. But it seems not to prevail to discussion even from the necessary evidence just that governor on the time of the execution. While evidence was ill in not having evidence, it objected to [illegible]'s giving by necessary witness that Thurber was also that in the [illegible] and [illegible] [illegible]. A police officer the had no knowledge of the [illegible], was by [illegible] [illegible] but a witness for the defense of Parent, but it does not appear that the [illegible] was ever interested in the [illegible] of Kirin. That Thurber is the time of his [illegible] [illegible] of being [illegible] appears from the evidence. Shortly after his disappearance he made the [illegible] a letter and inclosed in the envelope a letter to his wife. He [illegible] in the [illegible] [illegible], Thurber was [illegible] from [illegible]. Finally, after his disappearance, [illegible] to the chief of police and members of the police department and [illegible] [illegible] to try and [illegible] Thurber, and that [illegible] they would do all they could in the matter, and from the evidence of a police officer, which by [illegible], it appears that they "put on a very [illegible] [illegible] to find him. They [illegible] not only in this state but in every state in the union or in any place that have any [illegible] or [illegible] [illegible] [illegible] or might be. They [illegible] every [illegible] to try and locate the man. They [illegible] all [illegible] him." Finally noticing the [illegible] of the disappearance of Thurber [illegible], and the [illegible] [illegible] that they could do all in their power to find him. At the time of the trial of this case, in December, 1914, nothing had been heard from Thurber,

and the same situation was present when the case was argued in this court, in December, 1935.

Defendant contends that the fact that a warrant was taken out for the arrest of Forster in connection with the shooting of Martin is ample reason to cause him to remain away. While the shooting of Martin may have been sufficient reason to cause him to leave his home, it does not follow that the jury were not justified in finding that it was not sufficient reason to cause him to remain away from his wife and children for these many years, during which time they have never heard from him. The evidence introduced by defendant to show that Forster shot Martin would not make out, by competent evidence, a prima facie case against Forster if he were tried upon that charge, and it may well be that the state's attorney did not secure an indictment against Forster because there was no competent evidence to prove Forster guilty of any charge in reference to the shooting. It is a matter of common knowledge that the state always promptly seeks an indictment, where an alleged offender has fled, in order to aid extradition proceedings should the fugitive be arrested in another state. The brother of Martin, called as a witness by defendant, testified that he had never done anything about the case as he was not interested in it. There is nothing to show that the warrant taken out years ago is still in force or that Forster would be prosecuted if he returned. Defendant also argues that Forster had domestic difficulties which made his home life unhappy and that that fact might account for his absence, but the evidence shows that subsequent to the separate maintenance proceedings Forster and plaintiff were reunited and that thereafter Forster was a kind and affectionate husband and father. Over eleven years have elapsed since he disappeared and it is difficult to believe that if he were alive he would not at least communicate with his wife or young

and the same situation was present when the case was argued in this court, in December, 1959.

Defendant contends that the fact that a warrant was taken out for the arrest of Torrico in connection with the shooting of Maria is ample reason to state its the result sought. While the admitting of Maria's out-of-court statements results in some risk to Jorge his prosecution, it does not follow that the jury knew and judged in finding that it was not sufficient evidence to which the to convict many from the other many people. During which time they have never heard from him. The evidence introduced by defendant is that Torrico does not which would not, by conceivable evidence, a prima facie case against Torrico if he were called upon that charge, and it may well be that the district attorney did not elect to institute criminal proceedings there on the conceivable evidence to prove Torrico guilty of any charge in reference to the shooting. It is a matter of common knowledge that the district attorney seeks to institutions, where he finds sufficient evidence to that, is unfair to his institutions proceedings should the implies be directed to another state. The trial court of Darling, relied in a civil case by defendant, insisted that he had never been criminally charged and he was not interested in it. There is nothing in evidence that Torrico makes out prima facie case in civil in form or that Torrico would be prosecuted if he returned. Defendant also argues that Torrico has demonstrated difficulties which mark his home life unhappy and that this might account for his absence, but the evidence shows that unhappiness is the expressis mutandis proceedings because and plaintiff were married and that thereafter Torrico was a kind and affectionate husband and father. Their eleven years have elapsed since he disappeared and it is difficult to believe that if he were alive he would not by some communicate with his wife or family

daughters. Defendant promised plaintiff a number of years ago that it would trace her husband. From the industry shown in the preparation of the defense in the instant case we must presume that defendant's agents have made every reasonable effort to locate Forster. We are satisfied that the jury in the instant case would have been justified in finding that while the mere fact that the shooting of Martin may have been sufficient reason to cause Forster to leave his home, it was not, under all the facts and circumstances of the case, such an explanation of his continued absence for nine years as to rebut the presumption of his death. In this connection see Piersol v. Massachusetts Mut. Life Ins. Co., 260 Ill. App. 578, and Mueller v. John Hancock Mut. Life Ins. Co., 290 Ill. App. 519.

Defendant contends that the trial court erred in refusing to give several instructions offered by it. One was clearly bad, and the subject matter of the other two was fully covered by instructions given by the court.

Defendant contends that the verdict is contrary to the manifest weight of the evidence. We find no merit in this contention.

After a careful consideration of the evidence in this case we are satisfied that the judgment of the Circuit court of Cook county is a just one and should be affirmed, and it is accordingly so ordered.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

[illegible]. Informing prospective plaintiff's counsel of probable cause that it would issue his subpoena. From the testimony above in the proposition of the defense in the instant case is most persuasive that defendant's counsel knew such agency reasonable effort in locating Thurber. To one noticing that the jury in the instant case could have been justified in finding that while the same fact that the adoption of Torrin may have been sufficient cause to cause Thurber to leave his army, it was not, under all the facts and circumstances of the case, such an explanation of his continued absence for which proof is in right the prosecution of his duties. In this connection see Fleming v. [illegible], [illegible] Cal. [illegible], [illegible] and Smalley v. [illegible], [illegible] Cal. [illegible], [illegible] [illegible].

Defendant maintains that the trial court erred in sustaining to give several instructions offered by it. The one already [illegible], and the subject matter of the other two was fully covered by instructions given by the court.

Defendant contends that the verdict is contrary to the manifest weight of the evidence. We find no merit in this contention.

There is ample corroboration of the witness in this case we are satisfied that the judgment of the Circuit Court of Cook County is a just one and should be affirmed, and it is accordingly so ordered.

JUDGMENT AFFIRMED.

Gallivan and Trybul, JJ., concur.

24 H

38170

PECK & HILLS FURNITURE COMPANY, a corporation, Appellant, v. O. E. MERKLING, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 632

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellant, appeals from an order entered February 15, 1935, vacating a judgment in its favor in the sum of $404.81 rendered in the cause on November 25, 1931.

Plaintiff sued defendant, appellee, for merchandise alleged to have been sold and delivered by it to defendant. The statement of claim was filed November 13, 1931. The summons was returnable November 25, 1931. The return of the bailiff shows personal service upon defendant on November 16, 1931. On the return day the cause was called for hearing and judgment by default was rendered against defendant in the sum of $404.81. On January 19, 1935, defendant filed his verified petition to vacate the judgment, in which he alleged that he was not indebted to plaintiff. The verified petition filed by defendant to vacate the judgment alleges, inter alia:

"Your petitioner further states that the first knowledge that he had of said judgment pending against him was when he applied for a Home Owner Loan Corporation loan, said judgment appearing among numerous objections in a letter of opinion issued by the Chicago Title and Trust Company on the _____ day of December, 1934.

"* * * that the files in the Municipal Court disclose that an execution was issued number 1366743 on January 3, 1935, and that said judgment is a lien on the property on which your petitioner is seeking to obtain a Home Owner Loan Corporation loan.

"* * * that he is not indebted to Peck and Hills Furniture

Company, a corporation, the plaintiff in the above entitled cause in any sum whatsoever; that the merchandise on which the judgment in the above entitled cause was obtained was not received by your petitioner individually, but states the fact to be that said debt on which the said judgment was predicated was incurred by O. E. Merkling Company, a corporation, received the aforementioned merchandise.

"* * * that the summons show that service was had upon him upon May 16, 1931, but that in fact service was not had on this defendant personally and that he never received any summons in the above entitled cause.

"* * * that O. E. Merkling Company, a corporation, went into bankruptcy and the plaintiff, Peck and Hills Furniture Company, a corporation, did receive two dividend checks from O. E. Merkling Company, a corporation, toward the payment of the above merchandise; receiving a twenty per cent dividend check on May 20, 1932 in the sum of $81.70 and a fourteen and two-fifths per cent dividend check on December 8, 1932 in the sum of $58.83 reducing said account for $404.81 to the total amount of $264.28.

"Wherefore your petitioner prays that the judgment against him may be vacated and set aside and held for naught, and your petitioner being duly bound will ever pray."

Plaintiff filed the following "Objections to Petition of Defendant for Vacating Judgment:"

"1st: That the Court at this time is without jurisdiction to change its final judgment entered on November 25, 1931.

"2nd: That the petition of defendant contains no allegations of facts, which brings this case within the class of cases where a Court may correct a final judgment after thirty days have elapsed after the entry thereof.

"3rd: The return of the Bailiff is conclusive as between the parties and cannot be taken advantage of after thirty days after final judgment.

"4th: That the defendant, O. E. Merkling, at the time of the entry of said judgment on, to-wit, November 25, 1931, was indebted to Peck & Hills Furniture Company, a corporation, in the full amount of said judgment for goods, wares and merchandise sold and delivered by plaintiff to defendant at defendant's special instance and request, as set out in the statement of claim filed in the above entitled cause.

"5th: That said defendant did have notice of the proceeding herein because of the fact that the records show that he was personally served by the Bailiff of the Municipal Court by Deputy Prendergast on, to-wit, November 16, 1931; that said summons showing such return was filed on November 23, 1931, and that on, to-wit, November 25, 1931, when the case came on for hearing upon return day in Room 906 of the Municipal Court, judgment was entered by default for $404.81 and costs; that the return of said Bailiff cannot be attacked in this proceeding at this time.

"6th: That since the rendition of said judgment on, to-wit, November 25, 1931, no motion was made nor petition filed within the thirty days following such rendition, nor at any time thereafter until the petition herein objected to, which was served upon plain-

Company, a corporation, the plaintiff in the above entitled cause in any one instance; that the instructions or which the judgment in the above entitled cause was obtained was not received by petitioner individually, but states the fact to be that said Ben on which the said judgment was predicated was inserted by G. K. Spalding Company, a corporation, received the aforementioned instructions.

"* * * that the summons show that service was had upon him upon July 1s, 1921, but that it that service was not had on this defendant personally and that he never received any summons in the above entitled cause.

"* * * that G. K. Spalding Company, a corporation, was into bankruptcy and the plaintiff, Fox and Hills Furniture Company, a corporation, did receive the dividend checks from G. K. Spalding Company, a corporation, toward the payment of the above mentioned, receiving a twenty per cent dividend check on July 2d, 1924 in the sum of $21.72 and a fourteen and one-fifth per cent dividend check on December 8, 1925 in the sum of $15.60 reducing said account for $104.82 to the total amount of $64.82.

"Therefore your petitioner prays that the judgment entered him may be vacated and held and held for naught, and your petitioner being duty bound will ever pray."

Plaintiff filed the following "objections to petition of defendant for Vacating Judgment:"

"1st: That the court at this time is without jurisdiction to change the final judgment entered on November 22, 1921.

"2nd: That the petition of defendant contains no allegations of facts, which bring this case within the class of cases where a court may vacate a final judgment after the term at which it was entered after the entry thereof.

"3rd: The return of the Sheriff is conclusive as between the parties and cannot be taken advantage of after thirty days after final judgment.

"4th: That the defendant, G. K. Spalding, at the time of the entry of said judgment on 22-nd, November of 1921, was insolvent in fact a mere Rotating Company, a corporation, in the full amount of said judgment for goods, wares and merchandise sold and delivered by plaintiff to defendant at defendant's special instance and request, as set out in the statement of claim filed in the above entitled cause.

"5th: That said defendant did have notice of the pendency herein because of the fact that the summons show that the personality served by the Sheriff of the municipal Court by leaving President on 22-nd, November 1s, 1921; that said summons showing such return was filed on November 22, 1921, and that on, 12-nd, November 1s, 1921, when the case came on to be entered upon motion by in Room 908 of the Municipal Court, judgment was entered by default for $104.82 and costs; that the return of said Sheriff cannot be attacked in this proceeding at this time.

"6th: That since the rendition of said judgment on, 12-nd, November 22, 1921, no execution was ever issued within thirty days following such rendition, nor at any time thereafter until the petition herein defendant 12, 1924 was served upon plain-

tiff's attorneys on, to-wit, January 21, 1935, and therefore, the Court is without jurisdiction to change the judgment as entered.

"7th: Plaintiff admits that since the rendition of said judgment O. E. Merkling Company, a corporation, with which the defendant was connected, went into bankruptcy and scheduled the claim of the plaintiff, and thereafter two dividends were paid by the Bankruptcy Court to the plaintiff in the sums of $81.71 on May 2, 1932, and $58.83 on November 18, 1932, respectively; that said amounts should be credited on the judgment herein accordingly.

"8th: Plaintiff therefore says that there is due it from the defendant the sum of $404.81, together with interest at the rate of 5% upon the amount of said judgment from time to time unpaid, after allowing said two payments of $81.71 on May 2, 1932, and $58.83 on November 18, 1932, and also costs."

When the petition came on for hearing plaintiff objected to the hearing of any testimony in regard to the petition "on the ground that the court is without jurisdiction at this time to set aside the judgment." The position of plaintiff was that defendant was conclusively bound by the bailiff's return after the expiration of thirty days from the date of the entry of the judgment unless a false return was procured by fraud or misconduct on the part of plaintiff; that no fraud on the part of plaintiff was alleged in defendant's petition and hence the court was without jurisdiction to vacate the judgment entered November 25, 1931; that if the bailiff made a false return defendant's rights were limited to an action against the bailiff in the absence of fraud or misconduct on the part of plaintiff in procuring the false return.

Defendant testified that he never personally purchased any merchandise from plaintiff corporation; that he was never served personally with a summons in the case, and that he had no knowledge of the existence of the law suit until he received a letter from the Chicago Title & Trust Company, in December 1934, in reference to an application for a Home Loan, in which letter the judgment was noted. Henry Krueger, an employee of O. E. Merkling & Company, testified that the summons in the instant case was handed to him by the bailiff;

Later, although on Monday, January 23, 1933, and thereafter, the Court is filed petitions to vacate the judgment in question.

"The Bankruptcy Act provides that upon the petition of said judgment C. E. Kerlin, Agent, a corporation, with which the defendant was connected, went into bankruptcy and assumed the claim of the plaintiff, and therefore the claimant was just as the bankruptcy Court in the plaintiff in the case of 22.71 as June 2, 1933, and filed on December 14, 1933, respectively that said petitions should be granted as the judgment herein satisfied.

"That Plaintiff respectfully says that there is due to Mrs. Katherine Vo ung of Kiln, Mississippi, with interest at the rate of 5% upon the amount of said judgment from this date, which after allowing said the payments of 22.71 on day 2, 1933, and 22.71 on December 14, 1933, and date hereof."

Then the petition came on for hearing, plaintiff objected to the hearing of any testimony in regard to the petition "on the ground that the court is without jurisdiction at this time to act upon the petitions." The position of plaintiff was that defendant was constructively served by the sheriff's return after the expiration of thirty days from the date of the entry of the judgment making a false return was procured by fraud or misconduct on the part of plaintiff; that no fraud on the part of plaintiff was alleged in defendant's petition and hence the court was without jurisdiction to vacate the judgment entered November 28, 1932; that if the sheriff made a false return defendant's rights were limited to an action against the sheriff in the absence of fraud or misconduct on the part of plaintiff in procuring the false return.

Defendant testified that he never personally purchased any merchandise from plaintiff corporation; that he was never served personally with a summons in the case, and that he had no knowledge of the existence of the law suit until he received a letter from the Illinois Title & Trust Company, in December 1934, in reference to an application for a home loan, in which letter the judgment was noted. Henry Iseger, an employee of C. W. Kerlin & Company, testified that the summons in the instant case was handed to him by the sheriff;

that about that time O. E. Merkling & Company, a corporation, contemplated bankruptcy proceedings, and that, assuming that the summons had reference to the bankruptcy proceedings, he handed it to the attorney for the corporation; that defendant was out of town at the time that the bailiff left the summons. It was conceded that plaintiff scheduled the claim in the instant case in the bankruptcy proceedings against O. E. Merkling & Company, a corporation, and that plaintiff was paid by the bankruptcy court on account of the claim $81.71 and $58.83, and that these amounts should be credited on the judgment in the present proceeding. The bailiff who made the return on the summons was not called as a witness nor was his absence explained. Plaintiff offered no evidence.

In this court, as in the trial court, the sole contention of plaintiff is that "both parties to a suit at law are conclusively bound by the sheriff's return after the term of court has ended, in which final judgment was entered, unless a false return has been procured by the fraud of the plaintiff, and the court no longer has jurisdiction to change or vacate the judgment or to enter any further order in the case." In support of this contention plaintiff cites such cases as Chapman v. North American Ins. Co., 292 Ill. 179, which have no application to the instant appeal. At the time judgment was entered, on November 25, 1931, section 21 of the Municipal Court Act, of the city of Chicago, contained the following provisions:

"* * * If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided, however, that all errors of fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

It is unnecessary to refer to the cases that hold that section 21

that about that time G. H. Merkling & Company, a corporation, consummated bankruptcy proceedings, and that, assuming that the answer had reference to the bankruptcy proceedings, he handed it to the attorney for the corporation; that statement was one of fact at the time that the bailiff left the summons. It was conceded that plaintiff withdrew the claim in the instant case in the bankruptcy proceedings against G. H. Merkling & Company, a corporation, and that plaintiff was paid by the bankruptcy court on account of the claim $21.71 and $5.63, and that these amounts should be credited on the judgment in the present proceeding. The bailiff who made the return on the summons was not called as a witness nor was his absence explained. Plaintiff offered no evidence.

In this court, as in the trial court, the sole contention of plaintiff is that "both parties to a suit at law are conclusively bound by the sheriff's return after the term of court has ended, in which final judgment was entered, unless a false return has been procured by the fraud of the plaintiff, and the court no longer has jurisdiction to change or vacate the judgment or to enter any further order in the case." In support of this contention plaintiff cites such cases as Chapman v. North Western Ins. Co., 22 Ill. 179, which have no application to the instant appeal. At the time judgment was entered, on November 23, 1921, section 21 of the Municipal Court Act, of the city of Chicago, contained the following provisions:

"* * * If an action is vacated, set aside or modified on motion or writ of error, or by a writ in equity, or by a petition in said municipal court seeking relief from a judgment, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity. Provided, however, that all issues of fact in the proceedings in such case, which might have been tried and decided as issues of fact by the writ of error, bill in equity, may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

It is unnecessary to refer to the cases that hold that section 21

gives to the Municipal court power and authority after the lapse of thirty days from the entry of the judgment to vacate on petition setting forth facts which would be sufficient to cause the same to be vacated in a court of equity. The petition need not allege that the false return was procured through the fraud of plaintiff, nor is the petitioner in such a proceeding conclusively bound by the return.

In its reply brief plaintiff realized that its position in the trial court and in this court was not sustained by the law, and it has filed a motion for leave to file "an addition to 'Statement of the Case' in the Brief and argument for Appellant," which includes nothing but "the errors relied upon for reversal." The gist of the additional errors that set up grounds not urged in the trial court or here, is that the evidence introduced in support of the petition was not sufficient to overcome the rule that the trial court in the exercise of its equitable jurisdiction had no right to set aside the return of the service of the bailiff unless the proof of non-service was clear and convincing. Action upon this motion was reserved until the hearing. Plaintiff tried the case upon the theory that the trial court had no jurisdiction to entertain the petition and adhered to that position in its original brief in this court, and defendant is undoubtedly justified in contending that plaintiff should not be allowed in its reply brief to adopt an entirely different theory. However, in our determination of this appeal we have considered the additional grounds urged by plaintiff. After a careful review of the facts and circumstances we are satisfied that the evidence introduced in support of the petition was sufficient to sustain the order of the trial court vacating the judgment by default. The record shows conclusively that the claim of plaintiff upon which the judgment was based was against C. W. Merkling & Company, a corporation, and not against defendant. The failure to call the bailiff who made

the return upon the summons is not without significance. Plaintiff's motion, hereinabove referred to, is allowed.

The judgment of the Municipal court of Chicago entered February 15, 1935, is affirmed.

JUDGMENT ORDER ENTERED FEBRUARY 15, 1935, AFFIRMED.

Sullivan and Friend, JJ., concur.

The state does not account for our actual circumstances. Plaintiffs motion, notwithstanding referred to, is without.

The judgment of the municipal court of Cuyahoga County, Ohio, is affirmed.

DATED: [illegible] [illegible] EDWARD [illegible]
ATTORNEY.

Publication and Entry, [illegible] concur.

25 A

38181

PHILIP GOLLNER CO., INC.,
a corporation, for use of
SOUTH WEST TRUST & SAVINGS
BANK,
Appellee,

v.

EQUITABLE FIRE & MARINE
INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

283 I.A. 632

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In this case there was a verdict returned finding the issues against defendant and assessing plaintiff's damages at the sum of $1,395.26. Plaintiff thereafter remitted ~~$140~~ $113.11 from the verdict and judgment was entered for ~~$1,255.26~~ $1,282.15. Defendant appeals.

Plaintiff's amended statement of claim alleges, in substance, that the suit is brought for the use of South West Trust & Savings Bank; that Philip Gollner Company, Inc., a corporation, had total fire insurance of $75,000 on the contents of its buildings at 1838-70 West 33d street, Chicago; that the policy issued by defendant was in the amount of $2,500; that while defendant's policy was in full force a fire occurred on the premises, on September 3, 1932, which damaged and destroyed the contents; that notice was at once given to defendant; that plaintiff at once proceeded to make a complete inventory of the property, stating the quantity and cost of each article and the amount claimed; that the sworn proof of loss was furnished to defendant in January, 1933, defendant having waived the sixty days provision for filing the same; that plaintiff then

named an appraiser and requested defendant to name one, but that defendant failed to do so; that plaintiff has complied with all of the conditions of the policy save in the one instance where the provision was waived, wherefore it claims that defendant is indebted to plaintiff in the sum of $2,500. In its affidavit of merits defendant sets up three affirmative defenses. The gist of each is that the policy became void by its terms because plaintiff, after the fire, misrepresented material facts and circumstances concerning the personal property on which it was insured and was guilty of fraud and false swearing. Plaintiff, in its reply to the affidavit of merits, denied the truth of the affirmative defenses and alleged that the loss was in the amounts claimed by plaintiff, and denied that it was guilty of fraud or sought to cheat or defraud defendant. Defendant raises no point on the sufficiency of the pleadings.

Defendant calls attention to a provision in the policy which specifies that the policy "shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss," and contends that the finding of the jury that plaintiff was not guilty of fraud or false swearing is contrary to the manifest weight of the evidence. The question as to whether or not plaintiff was guilty of fraud and false swearing was one of fact, for the jury to decide, and after a careful consideration of all of the evidence bearing upon the question we are satisfied that we cannot sustain the instant contention.

Defendant contends that "the remarks in argument of counsel for plaintiff, to which proper objection was made, prejudiced the defendant." Defendant has not seen fit to call our attention to

manner an erroneous and improperly informed jury verdict, but that defendant failed to do so; that plaintiff has complied with all of the conditions of the policy save in this one instance where the provision was waived, whereupon it claims that defendant is indebted to plaintiff in the sum of $3,000. In its affidavit of merits defendant sets up three affirmative defenses. The gist of each is that the policy upon which the action herein plaintiff, after the fire, misrepresented material facts and circumstances concerning the personal property on which it was insured and was guilty of fraud and false swearing. Plaintiff, in its reply to the affidavit of merits, denied the truth of the affirmative defenses and alleged that the loss in the amounts claimed by plaintiff, and denied that it was guilty of fraud or sought to cheat or defraud defendant. Defendant makes no point as to the sufficiency of the pleadings.

Defendant calls attention to a provision in the policy which specifies that the policy "shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss," and contends that the finding of the jury that plaintiff was not guilty of fraud or false swearing is contrary to the manifest weight of the evidence. The question as to whether or not plaintiff was guilty of fraud and false swearing was one of fact, for the jury to decide, and after a careful consideration of all of the evidence bearing upon the question we are satisfied that we cannot sustain the instant contention.

Defendant contends that "the remarks in argument of counsel for plaintiff, in which proper objection was made, prejudiced the defendant." Defendant has not seen fit to call our attention to

the specific remarks of which it complains. We have, however, examined the argument of plaintiff's counsel and we find nothing in it to justify the instant contention.

The court instructed the jury orally, and defendant, before the jury retired, requested the court to further instruct the jury respecting several issues in the case, and contends that the court erred in refusing to grant defendant's request. One of the proposed instructions was highly argumentative. As to the other two instructions requested, the matters contained therein were covered by instructions already given, and we are satisfied that the jury were fully and fairly instructed on every material question in the case.

We find no merit in this appeal and the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

the specific counts of which it complained. We have, however, examined the arguments of plaintiff's counsel and we find nothing in it to justify the instant contention.

The court instructed the jury orally, and defendant, before the jury retired, requested the court to further instruct the jury respecting reversal issues in the case, and contends that the court erred in refusing to grant defendant's request. One of the proposed instructions was highly argumentative. As to the other two instructions requested, the matters contained therein were covered by instructions already given, and we are satisfied that the jury were fully and fairly instructed on every material question in the case.

We find no merit in this appeal and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Mulroy and Friend, JJ., concur.

26 H

38193

SAMUEL KALB,
Appellant,

v.

LEONARD H. BERENSON,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 632

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by plaintiff from a judgment in favor of defendant in a replevin suit.

Plaintiff sued to recover a truck and trailer which had been originally sold to one Miller by the International Harvester Company. The latter took back a conditional sales contract and mortgage as security for certain deferred installments of the purchase price. Miller sold the truck and trailer to Berenson, defendant, subject to the conditional sales contract and mortgage. Berenson instituted a replevin suit in the Municipal court of Chicago against Miller for possession of the truck and trailer, and made Miller and the Rodi Towing Service, Inc., parties defendant. The plaintiff in the instant proceeding, Kalb, filed an intervening petition in that suit in which he represented "that his claim to the said property is based upon one certain conditional sales agreement heretofore assigned to him by the International Harvester Company of America, a corporation, bearing date June 29, 1933, for a good and valuable consideration, by which contract the title to the International Tractor hereinabove described was and is reserved in your petitioner until the payment of the full purchase price provided in said contract has been made; * * * that on the date that the aforesaid property was

replevied there was a balance past due and unpaid upon the said conditional sales contract and that said balance is past due and unpaid on the date hereof and that title to the said property is in your petitioner, and has at no time passed out of your petitioner to any other person or persons, firm or corporation; * * * that his claim to the Wolverine Semi-trailer, replevied in the above entitled cause, is claimed by your petitioner by virtue of a certain chattel mortgage bearing date June 29, 1933, which chattel mortgage was assigned to your petitioner together with the aforesaid conditional sales contract by the International Harvester Company of America, a corporation * * *." The petitioner prayed that the court, on hearing, find the property and right of possession in the petitioner.

The half-sheet record of the Municipal court shows that the case was set for trial for September 24, 1934. That sheet also shows the following:

"Date	Judge	Ordered Entered
September 24, 1934	Frederick W. Elliott	By order Ct. intervening petition stricken Ex parte fr. by Ct. Fndg. right of prop in plff. in repn. plffs. das. one cent, judg. on fndg. for plff. in repn. plffs das one cent & c. (24)"

On the same date the following judgment was entered:

"Leonard H. Berenson,
vs.
Donald Y. Miller,
No. 2710280
Replevin

This cause coming on for further proceedings herein, it is considered by the Court that plaintiff have judgment on the finding herein, and that the plaintiff have and obtain possession of the property replevied herein.

It is further considered by the Court that the plaintiff have and recover of and from the defendant, the damages of the plaintiff herein amounting to the sum of One Cent (1¢), in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor."

After the instant replevin suit was commenced the defendant, Berenson, filed a special appearance "contesting the jurisdiction of the court," and at the same time also filed a petition in which he averred the commencement of the replevin suit in the Municipal court,

typewritten letter was a balance just the and upheld upon the sole conditions which contained and that said Bulmers is just due and subject on the date hereof and that title to the said property in your petitioner, and that at no time passed out of your petitioner by any other person or persons, firm or corporation; " = " that his claim to the "Splitting Tool-holder", typified in the above entitled cause, is claimed as your petitioner by virtue of a contract dated August twelfth thirty three 33, 1933, which contract covering was assigned to your petitioner together with the otherwise contractual rights involved by the International Harvester Company of Canada, " corporation " = " + ". The petitioner further that the court, so decreeing, that the property and right of possession in the petitioner.

The half-page record of the Municipal court shows that the case " " was tried for September 24, 1941. That court also shows the following:

"Date	Fees	Charged Against
September 24, 1941	Attorney fee	By cash on interpleading
	Marshal's fees	Petitioner claimant
		In favor of Mr. Taylor
		right of prop in suit. Ex
		pens, costs, fees, one work
		Judg, ex fees, for sit. on
		trans. pick. can one work i. e.

On the same date the following judgment was entered:

"Samuel E. Stevens,	Ex. stroke
vs.	
Donald T. Miller,	Replevin

This cause coming on for trial by consenting parties, it is considered by the court that plaintiff have judgment on the finding herein, and that the plaintiff have and retain possession of the property replevied herein.

It is further considered by the court that the plaintiff have not whatever as and from the defendant, the damage of the plaintiff herein arising growing in the sum of Sixty (60.) in lawful money of Canada, together with the costs by the plaintiff herein expended, and that execution issue therefor."

After the initial " plaintiff suit was commenced the defendant, Stevens, filed a general appearance "consenting the jurisdiction of the court," and at the same time also filed a petition in which he averred the commencement of the replevin suit in the Municipal court,

the seizure of the truck and trailer by the bailiff of the Municipal court by virtue of the replevin writ, and the possession by the defendant of the truck and trailer by reason of the writ. The petition further recites that on August 20, 1934, the return date of the suit in the Municipal court, Kalb, by leave of court, filed his intervening petition alleging that on August 20, 1934, he acquired, by assignment, a conditional sales contract and mortgage on the property in question; that after the filing of the intervening petition he, Berenson, on September 5, 1934, tendered all sums of money due or which might become due under said conditional sales contract or mortgage to Clarence W. Shaver, Kalb's attorney, and that Shaver refused to accept the same unless Berenson would pay, in addition to the amount due under the conditional sales contract and mortgage, the sum of $100 as and for his attorney's fees, which Berenson refused to pay; that on September 24, 1934, the replevin suit in the Municipal court was called for trial and judgment was entered for the plaintiff, Berenson, and that the intervening petition of Kalb was stricken and dismissed; "that the issues involved in this suit are the same as were involved in the said case in the Municipal Court of Chicago, and that the same is 'res adjudicata' as to the above entitled suit;" that Berenson is entitled to have the instant cause dismissed, and that an order be entered that the property and chattels involved be returned to him. Thereafter, upon motion of defendant, an order was entered that his special appearance stand as a general appearance and his petition as an answer to plaintiff's suit.

The trial court held that the judgment of the Municipal court in the replevin suit was res judicata of the matters involved in the instant suit. From an inspection of the record in the Municipal court proceeding it is clear that the trial court erred in so holding,

the guarantee of the trust and trustee by the bankrupt of the municipal court by virtue of the replevin writ, and the possession by the defendant of the trust and trustee by reason of the writ. The petition further recites that on August 30, 1920, the trustee made of the suit in the municipal court, Lack, by leave of court, filed his intervening petition claiming that on August 30, 1920, he acquired, by assignment, a conditional sales contract and mortgage on the property in question; that after the filing of the intervening petition he, Bernstein, on September 2, 1920, tendered all sums of money due or which might become due under said conditional sales contract or mortgage to Clarence J. Davis, Lack's attorney, and that Davis refused to accept the same because Bernstein was late;

In addition to the amount due under the conditional sales contract and mortgage, the sum of $10.00 was sued for his attorney's fee, which Bernstein refused to pay; that on September 24, 1920, the replevin suit in the Municipal court was called for trial and judgment was entered for the plaintiff, Bernstein, and that the intervening petition of Lack was dismissed and dismissed "that the issues involved in this suit are the same as were involved in the suit now in the Municipal Court of Chicago, and that the same is 'res adjudicata' as to the above entitled suit;" that Bernstein is entitled to have the judgment vacated, and that an order be entered that the property and chattels involved be returned to him. Therefore, upon motion of defendant, on order was entered that his special appearance stand as a general appearance and his position as an owner to plaintiff's suit.

The trial court held that the judgment of the municipal court in the replevin suit was res judicata of the matters involved in the instant suit. Upon an inspection of the record in the municipal court proceeding it is clear that the trial court erred in so holding.

as there was no final judgment rendered in the Municipal court upon the intervening petition. The argument that the judgment order can be construed as a finding and determination against the intervening petition of Kalb is without merit.

However, it appears from the record that after Kalb had filed his intervening petition in the replevin suit in the Municipal court, defendant, Berenson, tendered to Kalb's attorney, Shaver, all moneys that were due under the alleged conditional sales contract and mortgage, although there was no default at the time, and that the said tender was refused by Shaver unless Berenson would pay him, Shaver, in addition to the amounts due under the contract and mortgage, $100 "for his trouble;" that after the sheriff had taken the truck from Berenson Shaver stated to Berenson, "Well, you have to pay me now." The record further shows that during the trial of the instant case counsel for plaintiff raised the point that the tender had not been made in the instant proceedings, whereupon counsel for defendant offered to pay immediately any money that was coming to Kalb, provided the latter would turn the truck over to defendant. Thereupon the following occurred: "The Court: Do you wish to take his money and give him back his truck? That is the only just and honorable thing to do." The record shows that neither plaintiff nor his counsel made any direct answer to the tender or the question of the trial court. The tender and refusal in the instant case extinguished plaintiff's lien upon the property. (See Schwartz v. Chicago State Pawners Society, 195 Ill. App. 93, 97, and cases therein cited.)

The judgment of the Superior court of Cook county is a just one and it will be affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

be there was no final judgment rendered in the Municipal Court upon the interpleader pleading. The judgment that the judgment order can be construed as a finding and determination of just the intervening position of Kalb in without merit.

However, it appears from the record that after Kalb had filed his intervening petition in the replevin suit in the Municipal Court, Thomson, Kingsley, Bartlett & Kalb's attorney, Thomson, did advise that very fact during the trial of replevin suit and authorized, although this was not related at the time, and that the said lawyer was refused by Carter Wilson Harrison would pay him, Thomson, in addition to the amounts due under the contract and mortgage, this "for the trouble" that after the replevin had taken the block from Harrison Thomson stated to Harrison, "Well, you have to pay us now." The record further shows that during the trial of the instant case counsel for plaintiff raised the point that the bonder had not been made in the instant proceedings, whereupon counsel for defendant offered to pay immediately any money that was coming to Kalb, providing the latter would turn the trunk over to defendant. Thereupon the following occurred: "The Court: Do you wish to take his money and give him back his trunk? That is the only just and honorable thing to do." The record shows that neither plaintiff nor his counsel made any direct answer to the bonder or the question of the trial court. The bonder not related in the instant case motionfrom plaintiff's time upon the property. (See Bonnett v. Chicago Union Traction Company, 160 Ill. App. 88, 97, and cases therein cited.)

The judgment of the Superior court of Cook County is just one and it will be affirmed.

AFFIRMED.

Sullivan and Wyland, JJ., concur.

37 A

38226

CARL A. METZ, Appellee, v. BRISCH BRICK COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 633

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in contract for moneys claimed to be due, as follows: $200 for services rendered as an architect and engineer, and $552 as commission for selling two million brick. The case was tried by the court without a jury, the issues were found against defendant, and plaintiff's damages were assessed in the sum of $500. Defendant appeals from a judgment entered upon the finding.

Plaintiff's theory of fact is that after defendant's brick shed had blown down he was employed as an architect and engineer for the preparation of plans for rebuilding the shed, that he submitted plans, sketches and bids for the erection of the shed and that he is entitled to be paid for such work. He also claims that through his instrumentality defendant sold two million brick and that he is entitled to the customary and reasonable commission for such services. Defendant's theory of fact is that plaintiff was not employed by it as an architect; that he and other contractors were invited to submit plans and bids upon the understanding that the lowest bidder would be given the job of building the shed and that defendant would incur no liability or obligation to the other bidders; that plaintiff was an

JUDGE

[illegible] Appellee,

v.

[illegible] CORPORATION,
a corporation,
Appellant.

[illegible] FROM [illegible]
[illegible] OF [illegible].

Mr. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

An action is maintained for damage claimed to be due, on failure [illegible] for services rendered as an architect and engineer, and [illegible] as attorneys for [illegible] brick. The case was tried by the court without a jury, the issues were found against defendant, and plaintiff's damages were assessed in the sum of $[illegible]. Defendant appeals from a judgment entered upon the finding.

Plaintiff's theory of fact is that after defendant's [illegible] had been [illegible] he was employed as an architect and engineer for the preparation of plans for refurbishing the plant, that he [illegible] plans, [illegible] and bills for the services of the [illegible] and that he is entitled to be paid for such work. He also claims that through his [illegible] [illegible] made the million brick and that he is entitled to the customary and reasonable commissions for such services. Defendant's theory of fact is that plaintiff was not employed by it [illegible] [illegible] other architectural [illegible] to [illegible] and that the latter understood that the [illegible] would be given the job of [illegible] the [illegible] and that defendant would incur no liability or obligation to the other [illegible] that plaintiff was an

unsuccessful bidder; that plaintiff was not employed, by express or implied agreement, to sell brick; that he was not a licensed broker and that he interested himself in the sale of the brick in the hope that his plans and bid for the erection of the shed might thereby receive a preference over the other bidders. Defendant further contends that there is no competent evidence in the record tending to prove damages.

Defendant strenuously contends that the finding and judgment are against the manifest weight of the evidence. After a careful consideration of the evidence we have reached the conclusion that this contention is a meritorious one. If there were nothing in the case but the oral testimony the contention would have to be sustained, but in addition we find two letters, written by plaintiff, which, in our judgment, conclusively prove that plaintiff's present theory of fact is an afterthought. The letters are as follows:

"February 27, 1934.

Brisch Brick Co.,
228 N. LaSalle Street
Chicago, Ill.
Att. Michael Brisch Sr.

Dear Sir:

I certainly cannot understand human nature when, after what I have done for you, I do not get consideration from you in the matter of building your kiln shed.

Everyone who has seen the two designs have said there is no comparison, that my design is far superior.

I know the cards have been stacked against me from the beginning and that you favored Mr. Moll. Since you want to give him the job, I feel sure he will build my shed for the same price he is charging you for his shed. You admit that my design is the better of the two, and if he is willing I should be glad to have him figure my plan.

A bank will not dictate to you who you shall give a job to. After all it is to be your building and your son's after you, and you certainly should get a building you want.

Yours very truly,
Carl A. Metz."

"February 1, 1934.

Mr. Michael Brisch,
228 N. LaSalle St.,
Chicago, Ill.

Dear Sir:

Regarding your brick shed, there is only one quick way

unnecessarily sickly that plaintiff was not employed, by express or implied agreement, in such brisky that he was not a licensed broker and that he interested himself in the sale of the brick in the hope that his plans and bid for the erection of the shed might thereby receive a preference over the other bidders. Moreover further conclude that there is no competent evidence in the record tending to prove damages.

Defendant strenuously contends that the finding and judgment are against the manifest weight of the evidence. After a careful consideration of the evidence we have reached the conclusion that this conclusion is a meritorious one. If there was nothing in the case but the oral testimony the conclusion would have to be sustained, but in addition we find two letters, written by plaintiff, which, in our judgment, conclusively prove that plaintiff's present theory of lost is an afterthought. The letters are as follows:

"February 27, 1924.

Brisch Brick Co.,
328 W. Lucille Street
Chicago, Ill.

Mr. Michael Brisch Sr.

Dear Sir:

I unfortunately caught pneumonia before return home, after what I have done for you, I do not get commission from you in the matter of building your kiln shed.

Everyone the has seen the top designs have said there is no comparison, that my design is far superior.

I have the people have been shocked against me from the beginning and that you favored Mr. Hall. Often you said to give him the job, I feel sure he will write up what for the same price he is charging you for his shed. Our white lead by design is the better of the two, and if he is letting I should be glad to have been I have my plan.

A bank will not disclose to you who you shall give a job to. After all it is to be your building and your son's after you, and you certainly should get a building you want.

Yours very truly,
Carl A. Mets."

"February 1, 1924.

Mr. Michael Brisch,
328 W. Lucille St.,
Chicago, Ill.

Dear Sir:

Regarding that brick shed, there is only one quick way

to get it all settled and that is to let the job to one of us immediately, take the plans and estimate to your bank and they will make you a loan.

You should know by this time how you want the building built, since you can take the good features of the several different designs submitted to you. You also know approximately what the building will cost from the figures submitted to you.

An estimate to you now means nothing because we are all estimating a different building with a different tonnage of steel. There are many points in design unsettled such as, type of design, size of shed, arrangement of purlins to take a future roof material and monitor, the kind of paint to use, if any, etc. It is quite necessary to know all these things in order to give an intelligent estimate.

I am entitled to serious consideration from you for this job because of the 2 million brick order I got for you. Frankly, I got this order for you expecting in return a more than equal chance to get your job. If for any reason you do not want to work with me, all I ask is that you tell me so.

If you do want to work with me lets do it right and you, Locke, and myself sit down and definitely determine what kind of building to build. With this I can work up a plan and estimate which you can take to your bank and they will make you a definite loan. The reason the bank will not definitely commit themselves is because you can not definitely commit yourself to them as to what you are actually going to build. Get a definite proposition to them and they will make you a definite loan.

Should you give me the job, I shall be glad to let Mr. Moll figure my design, and if he is low, I shall gladly give him the job.

Follow my suggestion and within a week you will have everything settled including your loan, and you will be saving money because steel prices are bound to go up.

Yours very truly,

Carl A. Metz.

P.S. 41 bays will cost approximately $25,500 having a tonnage much higher than the building submitted by Mr. Moll."

The evidence shows that plaintiff, together with a number of other persons and corporations, submitted plans and bids for the construction of the new brick shed; that the bid of the New City Iron Works was the most favorable one from the standpoint of defendant and that it was awarded the contract. The evidence further shows that that company used its own plans in the construction of the shed. It appears that the trial court based his finding upon the fact that he had never known of an architect to draw plans without being paid for them. Such a finding, however, disregards the conclusive evidence that plaintiff and other contractors submitted bids and plans with the understanding that the lowest bidder would be given the job. It is true that plaintiff introduced Michael Brisch to Harvey Hansen, who was in the market for two million brick, and that Brisch negotiated a contract with Hansen as a result of

of other persons and corporations, submitted plans and bids for the construction of the new brick wall; that the bid of the Mr. Fly from York was the most favorable one from the standpoint of economy and that it was awarded the contract. The plaintiff also claims that he made one plan in the construction of the wall. It appears that the trial court based his finding upon the fact that he had never known of an architect to draw plans without being paid for them. Such a finding, however, disregards the conclusive evidence that plaintiff and other construction workers had set plans with the understanding that the lowest bidder would be given the job. It is true that plaintiff introduced Michael Dubick to Harvey Brown, who was in the market for two million brick, and that Dubick negotiated a contract with Brown as a result of

which defendant sold the latter the brick, but the evidence clearly shows that plaintiff, in what he did, was actuated by the hope that thereby he would have "a more than equal chance" to build the brick shed. While we are forced to hold that there was no legal obligation on the part of defendant to pay plaintiff in the matter of the Hansen order, we feel impelled to say that the officials of defendant, after plaintiff failed to secure the contract for building the shed, might well have given him something for his part in the Hansen sale.

Finding, as we do, that the evidence conclusively shows that plaintiff was not entitled to recover, the judgment of the Municipal court of Chicago will be reversed.

JUDGMENT REVERSED.

Sullivan and Friend, JJ., concur.

which education and the living wage bills, but the problems
directly under consideration, in which he did, was restricted by
the fact that they do not have to make them equal regardless
of which the bills come. This is not intended to mean that there
was no legal obligation on the part of Nationalist to pay identity
in the matter of the income bills, we feel impelled to say that
the activists of Nationalism, after personally failed to secure the
endorsed the initiative the view, which will have given the Nation-
alists the big part in the Dominion well.

Finally, it is to, that the provincial constitutional change
some priority over the political in Saskatchewan, the judgment of the
Nationalist events of Dominion will be reversed.

Editor and Friend, Ill. Sessions.

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MORRIS MINKUS, Appellee, v. J. W. FISHER, BAIRD & WARNER, INC., a corporation, ARTHUR R. HOLT, NUNN-BUSH SHOE COMPANY, a corporation; and IVAN BARTON GOODE, Appellants.	INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY. 283 I.A. 633

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Suit for specific performance and for an injunction. While the case was at issue, but before final hearing, the court, on plaintiff's motion, entered an interlocutory mandatory injunction order without requiring a bond from plaintiff. Defendants have appealed.

The suit involves the right to possession of a store and basement thereunder, at 53 West Washington street, Chicago. The fee of the premises is owned by the estate of A. C. Thomson, deceased, the trustees of which are New England Trust Company and Orrin C. Wood. The legal title to a 198-year leasehold interest in the property is held in the name of Arthur R. Holt, a trust officer of New England Trust Company. Neither the Trust Company, Wood nor the beneficiaries of the Thomson estate were made parties to the suit. Plaintiff went into possession of the premises under an assignment of a written lease executed by Forty North Dearborn Building Corporation, a former owner of the 198-year leasehold. Plaintiff's term commenced July 23, 1931, ends April 30, 1936, and the rental is fixed at $550 per month to April 30, 1932, $600 per month to April 30, 1933, and $750 per month thereafter. The

[redacted]

[redacted]

[redacted]

lease provides that "the lessee shall maintain during the term of this lease a water heater and tank to supply the hot water used by the lessee during the term of this lease." The lease also provides that the lessee shall have the right to terminate the lease on April 30, 1933, or on April 30 of any year thereafter, by giving to the lessor a six months' prior written notice of his desire to terminate and by paying to the lessor at the time of said notice $600 in addition to the stipulated rental. When Holt acquired the title to the 198-year leasehold interest, in January, 1936, New England Trust Company employed Baird & Warner, Inc., to manage the building and collect the rents and income therefrom.

The verified complaint alleges that the lease provides that the lessee shall pay to the lessor at the time of the signing of the lease the sum of $600, which is to be "held by the lessor to cover the termination bonus provided in the above paragraph in case the lessee shall terminate this lease as of April 30, 1933; and in case said lease is not terminated as of that date, said deposit shall be applied on the rent for the month of May, 1933;" that the lease was not terminated April 30, 1933, nor was the sum of $600 applied in payment of the rent for May, 1933, nor for any other month, but said sum was retained by the lessor or his agents; that on October 31, 1933, plaintiff informed J. F. Fisher, an agent of defendants Baird & Warner and Holt, that plaintiff desired to terminate the lease, effective April 30, 1934, and Fisher, as such agent, advised plaintiff that written notice of the termination would be waived, that said $600 would be applied as the termination bonus provided for in the lease, and that the lease would be regarded as terminated as of April 30, 1934; that prior to April 30, 1934, plaintiff had paid the owner of the leasehold interest, or his agent, the rent stipulated in the written lease, "except where the rental was reduced by mutual agreement; and for sometime preceding said date last mentioned, plaintiff

lease provides that "the Lessee shall maintain during the term of this lease a water heater and tank to supply the hot water used by the Lessee during the term of this lease." The lease also provides that the Lessee shall have the right to terminate the lease on April 30, 1933, or on April 30 of any year thereafter, by giving to the Lessor 6 six months' prior written notice of his desire to terminate and by paying to the Lessor at the time of said notice $200 in addition to the stipulated rental. Then Hall complied the title to the 1932-year immediate interest, in January, 1932. The Bulkard Trust Company employed Paul A Hardy, Inc., to manage the building and collect the rents and income therefrom.

The verified complaint alleges that the lease provides that the Lessee shall pay to the Lessor at the time of the signing of the lease the sum of $200, which is to be held by the Lessor to cover the termination bonus provided in the above paragraph in case the Lessee shall terminate this lease on of April 30, 1933; and in case said lease is not terminated on of that date, said deposit shall be applied on the rent for the month of May, 1933;" that the lease was not terminated April 30, 1933, nor was the sum of $200 applied in payment of the rent for May, 1933, nor for any other month, but said sum was retained by the Lessor at the growing, when on October 31, 1933, plaintiff informed [illegible] Hardy, as agent of defendants Hale & Hatter and Hall, that plaintiff desired to terminate the lease, effective April 30, 1934, and Hardy, as such agent, advised plaintiff that written notice of the termination would be given, that said $200 would be applied on the termination bonus provided for in the lease, and that the lease would be signed as terminated on of April 30, 1934; that prior to April 30, 1934, plaintiff had paid the owner of the remainder interest, or his agent, the rent stipulated in the written lease, "right after the rental was tendered by mutual agreement, and for months preceding said date the last month, plaintiff

had been paying and the defendants, Fisher, Baird & Warner, Inc., and Holt, had been accepting by mutual agreement the sum of $400 per month in full payment and satisfaction of the rental due by virtue of said written lease;" that in April, 1934, plaintiff and Fisher and Baird & Warner, as agents of defendant Holt, and the latter, as lessor, made and entered into an oral month to month lease for the premises commencing May 1, 1934, at an agreed rental of $400 per month and ten per cent of the gross sales in excess of $4,000 per month and that plaintiff continued in possession of the premises by virtue of said oral lease and paid to said defendants said rents; that to retain his possession, compete successfully with rival establishments, and to further extend his business, it became necessary for him to make certain extensive and costly permanent improvements in and about the premises, "providing he could obtain a further lease for a sufficient length of time to warrant and justify such expenditures;" that in July, 1934, plaintiff and Fisher and Baird & Warner, as agents for Holt, and Holt, as lessor, entered into an oral lease of the premises for a period of three years, commencing October 1, 1934, at a rental of $400 per month and ten per cent of plaintiff's gross sales in the operation of his shop and restaurant in excess of $4,000 per month; that by the terms of the oral lease it was agreed that said defendants would furnish plaintiff, during the period of the lease, hot and cold running water and heat in the premises, and would give plaintiff possession and quiet enjoyment of the premises, and plaintiff, in consideration thereof, agreed to pay the rental above set forth and agreed to install, before the cold weather began, at his own expense, certain lasting and permanent improvements (describing them); that on various days thereafter, and particularly on October 1, 1934, the same parties entered into an oral agreement for a written

and been paying and had [illegible], Plaintiff, Harry [illegible], has, and still, had been entitled to monthly appurtenant the sum of $200 per month in rent payment and [illegible] of the leasehold by virtue of said written lease;" that in April, 1947, Plaintiff and Father and Mother a lease, to Lessee of defendant Hall, and the Lessor, as Lessor, made and entered into an oral month to month lease for the premises commencing May 1, 1947, at the agreed rental of $200 per month and that plaintiff continues in possession of the premises by virtue of said oral lease and paid to said defendants said rental; that to retain his possession, complete successful rehabilitation, and to further extend his business, it became necessary for him to make certain extensive and costly permanent improvements in and about the premises, "providing he could obtain a further lease for a sufficient length of time to warrant and justify such expenditures;" that in July, 1948, Plaintiff and Father and Mother, by virtue of the lease, and daily, to Lessee, extended the oral lease of the premises for a period of three years, commencing October 1, 1948, at a rental of $200 per month and ten per cent of plaintiff's gross sales in the operation of his shop and restaurant in excess of $4,000 per month; that by the terms of the oral lease it was agreed that said defendants would furnish plaintiff, during the period of the lease, hot and cold running water and heat in the premises, and would give plaintiff possession and quiet enjoyment of the premises, and plaintiff, in consideration thereof, agreed to pay the rental above set forth and agreed to install, before the 1st October 1949, in his own expense, certain lighting and permanent improvements (described in them); that on various dates thereafter, and particularly on October 1, 1949, the same parties entered into an oral agreement for a written

lease of the premises on the terms and conditions of the oral lease; that plaintiff relied upon the said promises and continued in possession of the premises after October 1, 1934, and paid Baird & Warner, as agent, the rental of $400 per month, and "plaintiff offered to submit and did submit to them statements of his gross sales (which did not exceed $4,000 in any one month thereafter), and plaintiff, in November, 1934, at his own expense, made lasting and permanent improvements in and about said premises (describing them), * * * at a total expense of $1,525;" that the improvements were approved and accepted by defendants; that defendants conspired to eject plaintiff from the premises and deprive him of his right to possession and enjoyment thereof; that plaintiff states, on information and belief, that defendants have entered into a lease for a part of the premises with defendant Nunn-Bush Shoe Company and other persons whose names are unknown to plaintiff; that defendants have annoyed and molested him in his possession of the premises and have threatened to shut off the water and heat in the premises; that defendants have retained the legal services of defendant Goode and have caused a proceeding in forcible entry and detainer to be filed, in the Municipal court of Chicago, against plaintiff for possession of said premises, which is returnable on April 23, 1935; that plaintiff fears he will suffer irreparable harm and injury unless defendants are restrained and enjoined by a writ of injunction; that defendants, although often requested, have failed and refused to deliver to plaintiff a written lease in accordance with the oral agreement; that plaintiff has paid to defendant Baird & Warner, as agent for defendant Holt, and said agent has accepted from plaintiff, the rent due by virtue of the agreements up to and including March 30, 1935, but thereafter, although plaintiff tendered the rent when due, said defendants, in pursuance of said conspiracy, refused to accept said rent. The complaint prays, inter alia, that the defendants be

Lease of the premises as the lessee and possessor of the said Lease; that plaintiff relied upon the said promises and representations aforesaid at the premises after October 1, 1924, and paid Edwin A. Warner, as agent, the rental of $600 per month, and plaintiff offered to submit and did submit to them statements of Mr. Price sales (which did not exceed $4,000 in any one month thereafter), and plaintiff, in November, 1924, at his own expense, made lasting and permanent improvements in and about said premises (describing them) * * * at a total expense of $2,[illegible] that the improvements were approved and accepted by defendants; that defendants conspired to oust plaintiff from the premises and deprive him of his right to possession and enjoyment thereof; that plaintiff stated, at information and belief, that defendants have entered into a lease for a part of the premises with defendants Sam Shapiro and other persons whose names are unknown to plaintiff; that defendants have ousted and induced him in his possession of the premises and have threatened to shut off the water and heat in the premises; that defendants have violated the legal tenancy of defendant Moats and have caused a proceeding in forcible entry and detainer to be filed, in the Municipal court of Chicago, against plaintiff for possession of said premises, which is returnable on April 22, 1925; that plaintiff feels he will suffer irreparable harm and injury unless defendants are restrained and enjoined by a writ of injunction; that defendants, although often requested, have failed and refused to deliver to plaintiff a written lease in accordance with the oral agreement; that plaintiff has paid to defendant Edwin A. Warner, as agent for defendant Moll, and said agent has accepted from plaintiff, the rent due by virtue of the agreements up to and including March 20, 1925, but thereafter, although plaintiff tendered the rent when due, said defendants, in pursuance of said conspiracy, refused to accept said rent. The complaint prays, inter alia, that the defendants be

compelled to perform specifically their oral agreements for a written lease for the premises in accordance with the oral agreement, or, in the alternative, that defendants may be directed and compelled by decree to perform the said oral lease for the premises in accordance with the terms thereof; that defendants be restrained and enjoined from proceeding with the forcible entry and detainer suit and from molesting or interfering, or attempting to molest or interfere, with plaintiff's rightful possession of the premises or with his quiet enjoyment thereof. The lease in writing, and the assignment thereof under which plaintiff went into possession of the premises, was attached to and made a part of the complaint.

Defendant Holt, in his answer, alleged that he had not authorized Baird & Warner, Inc., Fisher, or anyone else to change or cancel the written lease now in existence and which is a part of plaintiff's complaint, and that he has not authorized anyone to enter into an oral lease for the premises, nor has he entered into any kind of lease or made any promises for a lease or authorized anyone to make a promise for him for a lease.

Defendant Fisher, in his answer, denies that he was the agent of Baird & Warner and Holt and alleges that he is an employee of that firm; denies that he waived written notice of termination of the written lease; denies that he agreed that the sum of $600 would be a termination bonus on the lease and alleges that he knows of no $600 given by plaintiff as a termination bonus on the lease; denies that he made and entered into an oral lease for a month to month tenancy; alleges that the original lease for $750 per month has at all times remained in full force and effect; alleges that the agreement to reduce the rent on the lease has been on a month to month basis; denies that he entered into an oral lease for the premises occupied by plaintiff for a period of three years as alleged in the

complied to perform specifically their and agreements for a written lease for the premises in question with the and agreement, or, in the alternative, that difficulties may be alleged and required to exists because by parties the oral lease for the premises in accordance with the terms thereof; that defendants be restrained and enjoined from proceeding with the threatened suit and from soliciting or interfering, or attempting to induce or interfere, with plaintiff's existing possession of the premises or with its quiet enjoyment thereof. The lease is writing, and the assignment thereof under which plaintiff took into possession of the premises, was attached to and made a part of the complaint.

Defendant Holt, in his answer, alleged that he had not contracted Baird & Warner, Inc., Tinker, or anyone else to change or amend the written lease now in existence and which is a part of plaintiff's complaint, and that he has not authorized anyone to enter into an oral lease for the premises, nor has he entered into any kind of lease or made any promises for a lease or authorized anyone to make a promise for his for a lease.

Defendant Tinker, in his answer, denies that he was the agent of Baird & Warner and Holt and alleges that he is an employee of that firm; denies that he moved without notice of termination of the written lease; denies that he agreed that the sum of $200 would be a reasonable bonus on the lease and alleged that he knew of no lease given by plaintiff or a reasonable bonus on the lease; denies that he made and entered into an oral lease for a month to month tenancy; alleges that the original lease for $200 per month has at all times remained in full force and effect; alleges that the agreement to renew the rent on the lease has been on a month to month basis; denies that he entered into an oral lease for the premises executed by plaintiff for a period of three years as alleged in the

complaint; denies that it was agreed to furnish plaintiff with hot water; alleges that he had no authority to enter into any lease; admits that a revolving door was put in and decorating done by plaintiff; denies that there was any promise on his part or on the part of anyone else, as far as he knows, to give plaintiff a written lease for three years or any other period of time; admits that a forcible entry and detainer suit was filed and that he had negotiated for a rental of the premises when and if possession was obtained and that such negotiations have culminated in the conditional entry of a lease with persons not parties to the suit; admits that he threatened to shut off the water for the reason that it was specifically understood that plaintiff would arrange to have equipment for his own hot water; that plaintiff had failed in that regard and defendant felt that he had a right to compel plaintiff to obtain such equipment, and that the only way to do so was by shutting off the water; denies that he has ever been asked to execute a written lease or that he ever promised to obtain the execution of one; denies that he ever had authority to promise such a lease.

The answer of defendant Baird & Warner, Inc., alleges that no $600 came into its possession as a termination bonus; denies that Fisher had any authority to waive written notice of termination of the lease; denies that the written lease had ever been cancelled; alleges that plaintiff has at all times paid lesser sums than provided in the lease and that such sums have been accepted in full for the months for which they were paid; alleges that the written lease was in full force at all times and that it was agreed to accept $400 per month rental thereunder until further notice; denies that it ever made an agreement with plaintiff in behalf of Holt for a three year lease; alleges that it had no authority from Holt to make such a lease and that it did not authorize Fisher to make such a lease; denies that it was agreed to give hot and cold water in the premises to plaintiff

complaint; denies that it was agreed by Canning Plaintiff with Hot Water; alleges that Hot is entirely at entire fault; admits that a written lease was put in and discussed; denies that Plaintiff; denies that there was any promise on his part or on the part of anyone else, so far as he knows, to give Plaintiff a written lease for three years or any other period of time; admits that a terrible entry and damage suit was filed and that he had negotiated for a release of the premises when and if possession was obtained and that such negotiations have culminated in the constitutional entry of a lease with persons not parties to the suit; admits that he threatened to shut off the water for the reason that it was specifically understood that Plaintiff would arrange to have equipment for his own hot water; that Plaintiff had failed in that regard and determined that he had a right to compel Plaintiff to obtain such equipment, and that the only way to do so was by shutting off the water; denies that he has ever been asked to assume a written lease or that he ever promised to obtain the signature of any director that he ever had authority to promise such a lease.

The answer of defendant Baird & Warner, Inc., alleges that on [illegible] some time the pretended or a termination notice; denies that Plaintiff had any authority to write written notice of termination of the lease; denies that the written lease had ever been cancelled; alleges that Plaintiff has at all times paid Lessor sums than provided in the lease and that such sums have been accepted in full for the months for which they were paid; alleges that the written lease was in full force at all times and that it was agreed to accept [illegible] per month month-to-month until further notice; denies that it ever made an agreement with Plaintiff in behalf of Holt for a three year lease; alleges that it had no authority from Holt to make such a lease and that it did not authorize Plaintiff to make such a lease; denies that it has agreed to give Hot hot water in the premises to Plaintiff

and alleges that it instructed Fisher not to give hot water in the premises; admits that plaintiff installed a revolving door but denies that he made any permanent improvements; admits title to the premises is in Holt; admits that it accepted $800 as per order of court on account of April and May, 1935, rent, but without prejudice.

Holt filed a counterclaim alleging that he was entitled to possession of the premises by reason of the fact that plaintiff has failed to comply with the terms of the written lease and asking judgment for possession.

Before answers were filed, defendants, upon notice, appeared before Judge Sabath, who entered an order (on May 2, 1935, nunc pro tunc as of April 29, 1935) which contained, inter alia, the following:

"The attorneys for the respective parties, in open court, having agreed:

"a. That the defendant Holt will not proceed with his case now pending in the Municipal Court of Chicago, entitled Arthur R. Holt, plaintiff, vs. Morris Minkus, defendant, #2638136, or interfere with the plaintiff's possession of the premises in question until the final disposition of the above-entitled cause.

"b. That the plaintiff pay to the defendant, Arthur R. Holt, or his agents, the sum of $400 per month, plus ten per cent of the gross sales in excess of $4,000, until the final disposition of this cause, or until the further order of this court, without prejudice to the rights of any of the parties hereto.

"And the Court having considered said verbal agreement made in open court by the respective counsel, hereby approves the same."

Sometime after answers were filed plaintiff filed a petition for a mandatory interlocutory injunction, without bond, which petition alleges that after Judge Sabath had heard evidence and arguments of counsel he indicated that a temporary injunction restraining defendants from interfering with plaintiff's possession of the premises would be issued, and that thereupon attorneys for defendants suggested to the court that an agreed order be entered in lieu of a temporary injunction; further alleges that plaintiff has complied with the agreement and defendants have interfered with his possession; alleges

and claims that it institutes "Under and in pursuant to the provisions of Article 1204 of the plaintiff's complaint and that the plaintiff's complaint be dismissed with costs in the proceeding in the amount of $500.00 per year at every an in July; claims that it occupies 1800 acres of land on account of April and May, 1929, and, but without prejudice,

Defs filed a counterclaim alleging that he was entitled to possession of the premises by reason of the fact that plaintiff has failed to comply with the terms of the written lease and violated covenants for possession.

Defendants answer also filed, defendants, upon leave, amended as before judge Cohen, who reserved on order for by 1, 1929, upon the ex of April 21, 1929) which mentioned, inter alia, the following:

"The attorneys for the respective parties, in open court, stated agreed:

"1. That the defendant defs will not proceed with his case now pending in the Municipal Court of Chicago, entitled Lindner v. Bell, plaintiff, vs. Jurgis Elsom, attorneys, defendant, at interfere with the plaintiff's possession of the premises in question until the final disposition of the above-entitled cause.

"2. That the plaintiff pay to the defendant, within 5, 10, or six months, the sum of $500 per month plus the per year of the gross rents in excess of $1,000, until the final disposition of this cause, or until the further order of this court, without prejudice to the rights of any of the parties hereto.

"And the Court having considered said verbal agreement made in open court by the respective counsel, hereby approves the same;"

Sometime after accounts were filed plaintiff filed a petition for a mandatory injunction, without bond, which petition alleges that after judge Lebeth had heard evidence and arguments of counsel he instructed that a temporary injunction restraining defendants from interfering with plaintiff's possession of the premises should be issued, and that thereupon attorneys for defendants suggested to the court that an agreed order be entered in lieu of a temporary injunction further alleges that plaintiff has complied with the agreement and defendants have interfered with his possession; alleges that defendants have violated covenants for possession and that the court ordered that an agreed order be entered in lieu of a temporary injunction and that thereupon attorneys for defendants suggested to the court that an agreed order be entered in lieu of a temporary

that the possession of the premises includes hot and cold running water and that defendants have shut off the hot water by deceit and misrepresentation of facts; alleges that Judge Sabath had ordered that plaintiff be given hot and cold running water in the premises; that unless a mandatory injunction compelling defendants to furnish plaintiff with hot water issue plaintiff will suffer irreparable loss and injury, and that such injunction should issue without bond.

The answer of Holt to the petition sets up practically all that was contained in his answer to the complaint; denies that he authorized anyone to make the alleged agreement before Judge Sabath; denies that the purported agreement set up in the order entered by Judge Sabath required him to furnish plaintiff with hot water; alleges that after he learned of the order he refused to accept any sums from plaintiff as rental and that plaintiff is now occupying the premises without the payment of any rental; alleges that on March 15, 1935, more than a month before the institution of the instant suit, the agents of New England Trust Company advised plaintiff, in writing, as follows:

"This is to notify you that we will no longer accept a payment of $400.00 as rental for a monthly period for the premises you now occupy in the Real Estate Exchange Building at #36-44 North DBarborn Street, and 51-53 West Washington Street, otherwise known as 53 West Washington Street and basement space thereunder. Your agreement for a rent reduction under the provisions of your lease expired as of April 30, 1933 as set forth in a letter dated September 13, 1932.

"Therefore, your rental beginning April 1, 1935 is at the rate of $750.00 per month as provided for in the lease dated March 21, 1931 to Elmer L. Carpenter and subsequently assigned to Morris Minkus.

"We also wish to call to your attention a violation of one of the clauses contained in the rider attached to the above referred to lease, which is as follows: 'It is understood that the Lessee shall maintain during the term of this lease a water heater and tank to supply hot water used by the Lessee during the term of this lease.' Since you are drawing your hot water from the building, will you kindly correct this default within five days as provided for in the first paragraph of the rider attached to the above referred to lease?"

that the presence of the pirates indicate but one week remaining after that that defendants were also not the bar notice by Canal and misrepresentation of facts; affirm that Judge Jackson had ordered that plaintiff be given not and said running water in the premises; that Admin a monitory injunction compelling defendants to furnish plaintiff with hot water lines plaintiff will suffer irreparable loss and injury, and that such injunction should issue without bond.

The answer of Holt to the petition was up practically all that was contained in his answer to the complaint; denies that he authorized anyone to make the alleged agreement before Judge Jackson; denies that the purported agreement was by in the order entered by Judge Jackson required him to furnish plaintiff with hot water; alleges that after he learned of the order he refused to accept any rent from plaintiff on record and that plaintiff is now occupying the premises without the payment of any rent; alleges that on June 17, 1938, more than a month before the institution of the instant suit, the agents of the Tenant Trust Company advised plaintiff, in writing, as follows:

"This is to notify you that we will be ready to begin repairs on Jan. 20 to remain for a monthly period for the premises you are occupy in the Fred Astor Kresinge Building at 22-24 North Sangamon Street, and 21-25 West Washington Street, otherwise known as 21 West Washington Street and Sangamon Alley respectively. Our agreement for a cost reducing water the provisions of your lease expires on of April 30, 1938 so not forth in a letter dated September 13, 1937.

"Therefore, your rental beginning April 1, 1938 in as the sum of $100.00 per month as granted for in the lease dated March 31, 1921 to Elmer L. Carpenter and subsequently assigned to Morris Kramer.

"We also wish to call to your attention a violation of one of the clauses contained in the right attached to the above referred to lease, which is as follows: 'It is understood that the lessee shall maintain during the term of this lease a water heater and hot water to supply hot water used by the lessee during the term of this lease.' Since you are getting your hot water from the building, will you kindly instead this refusal which you have to provide for in the first paragraph of the right attached to the above referred to lease?"

The answer further alleges that he does not maintain in the building a heater or tank for the heating of water, and that he is obliged to purchase steam for the heating of water for tenants in the building whose leases entitle them to hot water; that in order to supply plaintiff with hot water, to which he is not entitled under the written lease, it is necessary to deprive other tenants of hot water to which they are entitled; that notwithstanding Judge Sabath's statement at the time he entered the order of April 29, 1935, that the cause would be disposed of promptly, plaintiff and his counsel have resorted to various dilatory tactics for the purpose of delaying the final disposition of the case and plaintiff, thereby, remains in the unlawful possession of the premises under the pretended oral agreement; that the evidence taken before the master affirmatively shows that plaintiff has no legal right in the premises.

The verified petition came on for hearing before Judge Williams, who, on August 18, 1935, entered an order which recites the order entered by Judge Sabath, and further recites that plaintiff has complied with all of the provisions of that order and has tendered to the agents of Holt the stipulated rental; that

"4. The possession and quiet and peaceable enjoyment of said premises by plaintiff included the furnishing of running hot and cold water to plaintiff; and plaintiff was, prior to the entry of said order and continuously since - until August 14th, 1935, being furnished with running cold and hot water by defendant, Holt, and his agents.

"5. The defendants, J. F. Fisher, Baird & Warner, Inc. and Arthur E. Holt, by and through their agents, wilfully and wrongfully shut off the hot water supply to said premises contrary to and in violation of their said agreement and said order of this court.

"6. Plaintiff will suffer irreparable harm and injury unless an injunction is immediately issued herein directed to and against said last named defendants and their agents and attorneys, compelling and directing them to furnish and supply plaintiff with running hot water in said premises.

"7. Because of the above set forth facts the notice served by plaintiff upon the solicitors of record as of this day is sufficient.

The owner further alleges that he has not maintain in the building a heater or tank for the heating of water, and that he is obliged to purchase steam for the heating of water for tenants in the building whom Jones entitle them to hot water; that in order to supply plaintiff with hot water, he claim he is not entitled under the written lease, it is necessary to dispose other tenants of hot water he states that are entitled with maintenance. Judge Dowling's statement at the time he entered the order of April 22, 1930, that the cause could be disposed of promptly, plaintiff and his counsel have resorted to various illatory tactics for the purpose of delaying the final disposition of the case and plaintiff, thereby, remains in the unlawful possession of the premises under the pretended oral agreement; that the evidence taken before the master affirmatively shows that plaintiff has no legal right in the premises.

The verified petition came on for hearing before Judge Williams, who, on August 15, 1930, entered an order which vacates the order entered by Judge Dowling, and further recites that plaintiff has complied with all of the provisions of that order and has restored to the agents of Hall the premises rightfully held.

"4. The possession and quiet and peaceable enjoyment of said premises by plaintiff included the furnishing of running hot and cold water. By plaintiff and plaintiff's agents, later to the entry of said order and continuously since - until August 15th, 1930, being furnished with running cold and hot water by defendant, Hall, and his agents.

"5. The defendant, L. J. Fisher, Doing Business as Fisher, Inc. and Arthur C. Hall, by and through their agents, wilfully and wrongfully shut off the hot water supply to said premises contrary to and in violation of their said agreement and with a view of illegally evicting said tenant.

"6. Plaintiff also suffer irreparable loss and injury unless an injunction is immediately issued herein directing the said agents, with their proper subordinates and their agents and attorneys, immediately to turn on the hot water and supply plaintiff with running hot water in said premises.

"7. Because of the above and foregoing facts notice serve by plaintiff upon the defendants of issuance of this order is unnecessary.

"8. Because of the above set forth facts said injunction ought to issue without plaintiff's bond.

"It appearing to the court that said defendants will not be damaged by the issuance of said injunction, and it further appearing to the court that the issuance of said injunction would compel said defendants to do what they are legally bound to do by virtue of the order heretofore entered herein * * *."

Defendants, their agents and attorneys, are directed and required to furnish and supply plaintiff with running hot water and are enjoined from interfering with plaintiff's running hot water in the premises until the further order of the court. It is from this order that defendants appeal.

Plaintiff has not seen fit to file a brief in this court, but he has filed a motion "to strike appellants' abstract of record, to strike the record on appeal, and to dismiss the above appeal at appellants' costs." We find no merit in the motion and it will be denied. One of the principal reasons assigned in support of the motion is that the record improperly incorporates the report of proceedings before Judge Sabath. The report is properly signed by Judge Sabath and we find in the record a written stipulation signed by all of the counsel that the original report of the proceedings at the hearing before Judge Sabath, in lieu of a copy thereof, may be incorporated in the record on appeal by said defendants from the interlocutory order entered on August 15, 1935. It is significant that while the petition for a mandatory injunction contains statements as to alleged happenings before Judge Sabath, plaintiff should seek in the petition to have the report of the proceedings before that Judge stricken from the record. The order entered by Judge Sabath contains no provision in respect to the furnishing of water by defendants and the report of proceedings before that judge fails to show any such agreement entered into between the parties, but does ~~nax~~ show that no evidence was heard at the time of the entry of the order.

It appears from the record that on May 8, 1935, Judge

Sabath referred the case to Master in Chancery Gorski, to take testimony (all proofs to be closed within thirty days), the master to report his findings and conclusions of fact and law by June 14, 1935, and that on August 15, when the interlocutory order appealed from was entered, plaintiff had not completed his case before the master.

Defendants argue that as a general rule a mandatory injunction commanding the doing of some positive act will not be ordered except upon final hearing, and that while courts have a right to issue preliminary mandatory injunctions in cases of extreme urgency where the right is very clear and where the consideration of the relative inconvenience bears strongly in plaintiff's favor, great caution should be used in issuing a mandatory injunction on a preliminary hearing and the plaintiff must make out a clear case, free from doubt or dispute, as a basis for its issuance (Paxton v. Fabry, 200 Ill. App. 104); that even where such a case is present it is not proper to issue an interlocutory mandatory injunction without requiring a bond for plaintiff.

Defendants strenuously argue, and with much force, that the mandatory injunction order of August 15, 1935, should not have been entered even if it had contained a provision requiring plaintiff to give a proper bond, but we are not called upon to pass upon this contention for the reason that defendants, in their brief and in the oral argument, have indicated that they would be satisfied if the mandatory order should require plaintiff to file a good and sufficient bond to indemnify them against all loss, costs, damages and injury sustained by them by reason of plaintiff's remaining in the premises and receiving hot water therein in the event that it be finally determined that plaintiff has wrongfully withheld possession of the premises and was not entitled to have the defendants furnish him with hot and cold running water. The position of defendants, under the record,

Subsequently, the case is again in Chancery Court, on the testimony (all proofs in an closed within thirty days), the master by report his findings and conclusions of fact and law by June 14, 1994, and that on August 14, then the interlocutory order appealed from was entered, plaintiff had not completed his case before the master.

Defendants argue that as a general rule a mandatory injunction commanding the doing of some positive act will not be ordered except upon final hearing, and that while courts have a right to issue preliminary mandatory injunctions in cases of extreme urgency where the right is very clear and where the consideration of the relative inconvenience bears strongly in plaintiff's favor, such caution should be used in issuing a mandatory injunction on a preliminary hearing and the plaintiff must make out a clear case, free from doubt or dispute, as a basis for its issuance (Jenkins v. Kinney, 59 Ill. App. 324); that even where such a case is present it is not proper to issue an interlocutory mandatory injunction without requiring a bond for plaintiff.

Defendants strenuously argue, and with much force, that the mandatory injunction order of August 14, 1994, should not have been entered even if it had contained a provision requiring plaintiff to give a proper bond, but we are not called upon to pass upon this contention for the reason that defendants, in their brief and in the oral argument, have indicated that they would be satisfied if the mandatory order should require plaintiff to file a good and sufficient bond to indemnify them against all loss, costs, damages and injury sustained by them by reason of plaintiff's remaining in the premises and receiving not mere dividends in the event that it be finally determined that plaintiff has wrongfully withheld possession of the premises and was not entitled to have the defendants turned out with his and their belongings. The question of injunctions, under the facts and

is a most reasonable one, and they are clearly entitled to such a bond.

The judgment order of the Superior court of Cook county entered August 15, 1935, in so far as it finds that the injunction "ought to issue without plaintiff's bond" and orders that the injunctional order be entered "without plaintiff's bond," is reversed and the cause is remanded with directions to the trial court to enter an order requiring plaintiff to furnish, within a reasonable time, a good and sufficient bond indemnifying defendants against all loss, costs, damages and injury that may be sustained by them by reason of plaintiff's remaining in said premises and receiving hot water therein, in the event that it be finally determined that plaintiff has wrongfully withheld possession of the premises and was not entitled to receive, from defendants, hot water; and the trial court is further directed, if plaintiff fails to make and file such a bond within the time fixed by the trial court, to vacate in toto the order entered August 15, 1935.

JUDGMENT ORDER ENTERED AUGUST 15, 1935, REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

in a most irreparable way, and they are clearly entitled to such a bond.

The judgment order of the superior court of Cook county entered August 18, 1888, in so far as it finds that the injunction "ought to issue without plaintiff's bond" and orders that the interlocutory order be entered "without plaintiff's bond," is reversed and the cause is remanded with directions to the trial court to enter an order requiring plaintiff to furnish, within a reasonable time, a good and sufficient bond indemnifying defendants against all loss, costs, damages and injury that may be sustained by them by reason of plaintiff's remaining in said premises and receiving but water therein, in the event that it be finally determined that plaintiff has wrongfully withheld possession of the premises and was not entitled to receive from defendants, the rents and the trial court in further directed, if plaintiff fails to make and file such a bond within the time fixed by the trial court, to vacate in toto the order entered August 18, 1888.

[illegible]

[illegible]

Affirmed and Order, &c., common.

37931

OHIO-MILLERS MUTUAL INSURANCE COMPANY, a corporation,
Appellee,

v.

INTER-INSURANCE EXCHANGE OF THE ILLINOIS AUTOMOBILE CLUB, etc., et al.,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

283 I.A. 633

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued the Inter-Insurance Exchange of the Illinois Automobile Club, David Rosenbach, personally and as attorney in fact for the Inter-Insurance Exchange, and certain of its individual members who are called subscribers. The suit is similar in all respects to the proceedings instituted in consolidated cases Nos. 38113 and 38114. In this case, however, the court dismissed the suit for want of prosecution and thereafter reinstated the same. Certain defendants entered their special appearance for the sole purpose of questioning the jurisdiction of the court, and moved to expunge from the record the order reinstating the cause. Plaintiff appeared to oppose the motion, and after hearing the court denied the motion of defendants, finding that it had jurisdiction to enter the order and judgment. The question presented for consideration is one of jurisdiction, and is precisely the same as that raised in consolidated cases Nos. 38113 and 38114.

For the reasons stated in case No. 38113, we hold that judgment of the circuit court should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

Plaintiff sued the Inter-Insurance Exchange of the Illinois Automobile Club, David Crawford, personally and as attorney in fact for the Inter-Insurance Exchange, and several of its individual members who are solely underwriters. The suit is similar in all respects to the proceedings instituted in consolidated cases 3083 and 3084. In this case, however, the court dismissed the suit for want of prosecution and therefore substantial the cases. Certain defendants entered their special appearance for the sole purpose of quashing the jurisdiction of the court, and moved to strike from the record the order quashing the writs. Plaintiff appealed to review the motion, and after hearing the court denied the motion of defendants, finding that it had jurisdiction to enter the order and judgment. The question presented for consideration is one of jurisdiction, and is properly the same as that raised in consolidated cases Nos. 3083 and 3084.

For the reasons stated in case No. 3083, we hold this judgment of the criminal court should be "affirmed", but it is so ordered.

AFFIRMED.

Scanlan, P. J., and Tolliver, J., concur.

30 71

38026

FOREMAN-STATE NATIONAL BANK,
a corporation,
Appellant,

v.

CHARLES A. SISTEK, MAX H. BOYSEN,
JOSEPH CHOBOT, FRANK MUELLER,
CHARLES F. HOLUB, ROGER C.
WITTENBERG, ISRAEL ZWICK, ALOIS
URBANEC, S. KOBITSCHEK, PHILIP J.
FINNEGAN, E. T. CARLSON and
M. E. McGIVERN,
Appellees.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

283 I.A. 633

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The Foreman-State National Bank, a corporation, brought an action on the case against Charles A. Sistek, Max H. Boysen, Joseph Chobot, Frank Mueller, Charles F. Holub, Roger C. Wittenberg, Israel Zwick, Alois Urbanec, S. Kobitschek, Philip J. Finnegan, E. T. Carlson and M. E. McGivern, to recover damages resulting from false representations alleged to have been made by defendants in connection with a loan to Elston Securities Corporation of which Sistek was president and the other defendants were directors. Trial was had by jury resulting in a verdict, returned on February 23, 1934, for $10,000 against all the defendants. April 13, 1934, the court entered judgment in favor of defendants, having at the close of defendants' case reserved his decision on a motion for a directed verdict, from which plaintiff prosecuted its appeal direct to the Supreme court, claiming violation of its constitutional rights. In an opinion filed December 18, 1934, (358 Ill. 525) the Supreme court held that since no constitutional questions were raised in the trial

court, preserved of record or assigned as error, they were without jurisdiction, and transferred the cause to this court.

During the trial and after defendants had rested a written motion for a directed verdict was made on behalf of defendants. The court reserved its decision on the motion, under sec. 68, par. 3a, of the Civil Practice act (chap. 110, Ill. State Bar Stats., 1935). There was no motion for a new trial, and since the errors assigned are not dependent on the evidence no transcript thereof is incorporated in the record. The order from which this appeal is prosecuted, entered April 13, 1934, is as follows:

"On this day again come the parties to this suit by their attorneys respectively.

And now this cause coming on to be heard upon the motion heretofore entered herein by the defendants at the close of all of the evidence for the Court to instruct the jury to find all of the defendants not guilty which was at that time refused by the Court, the Court reserving unto himself the right to reconsider said motion for a directed verdict in favor of all of the defendants, and reserving his decision thereon until after the verdict of the jury.

And the said motion for a directed verdict in favor of all of the defendants now coming on for reconsideration by the Court for further hearing after verdict of the jury, heretofore rendered in this cause.

And the Court now here after hearing all of the evidence adduced, the arguments of counsel and being fully advised in the premises, said motion for a directed verdict in behalf of all of the defendants is sustained and the Court finds the defendants Charles A. Sistek, Max H. Boysen, Frank Mueller, Joseph Chobot, Roger C. Wittenberg, Israel Swick, Alois Urbanec, Charles Holub, S. Robitschek, E. T. Carlson, M. M. McGivern and Philip J. Finnegan not guilty, notwithstanding the verdict of the jury heretofore impanelled in this cause to which the plaintiff excepts.

It is therefore ordered that judgment be and the same is hereby rendered upon the finding of the Court in favor of the defendants and against the plaintiff and it is further ordered that the plaintiff Foreman-State National Bank, a corporation, take nothing by its aforesaid action but that the defendants, Charles A. Sistek, Max H. Boysen, Frank Mueller, Joseph Chobot, Roger C. Wittenberg, Israel Swick, Alois Urbanec, Charles Holub, S. Robitschek, E. T. Carlson, M. M. McGivern, and Philip J. Finnegan, go hence without day and do have and recover of and from the plaintiff their costs and charges in this behalf expended and have execution therefor."

We have before us the same brief filed by plaintiff in the Supreme court in which it makes but two points, both relating

court, preserved of record or analyzed in error, they were without jurisdiction, and transferred the cause to this court.

During the trial and after defendants had rested a motion motion for a directed verdict was made on behalf of defendants. The court reserved its decision on the motion, under sec. 68, par. 2a, of the Civil Practice Act (Ill. Rev. Stat. 1949, ch. 110, par. 68, par. 2a). There was no motion for a new trial, and since the errors assigned are not dependent on the evidence no transcript thereof is incorporated in the record. The order from which this appeal is prosecuted, entered April 12, 1949, is as follows:

"On this day again come the parties to this suit by their attorneys respectively.

And now this cause comes on to be heard upon the motion heretofore entered herein by the defendants at the close of all of the evidence for the court to instruct the jury to find all of the defendants not guilty which was at that time refused by the court, the Court respectively note doubtful the right to reversible and motions for a directed verdict in favor of all of the defendants, and reserving the decision thereon until after the verdict of the jury.

And the said motions for a directed verdict in favor of all of the defendants now coming on for consideration by the court for further hearing after evidence of the jury, heretofore rendered in this cause.

And the court has here after hearing all of the evidence adduced, the argument of counsel and being fully advised in the premises, sole motion for a directed verdict in behalf of all of the defendants is sustained and the court finds the defendants Charles L. Ziriel, Jr. Estate, Frank Smalley, George Cooper, Jr. Estate, Lewis Cole, Jack Dawson, Jesse Cole, L. Tomlinson, G. F. Hughes, S. S. Jeffers, and Frank Ziriel not guilty. Accordingly the judgment of the jury heretofore heretofore in this cause is also the judgment herein.

It is therefore ordered that judgment be and the same is hereby rendered upon the verdict of the court in favor of the defendants and against the plaintiff and it is further ordered that the plaintiff Tomlinson Trucking Co., a corporation, take nothing by its complaint herein but that the defendants, Charles L. Ziriel, Jr. Estate, Frank Smalley, George Cooper, Jr. Estate, Lewis Cole, Jack Dawson, Jesse Cole, L. Tomlinson, G. F. Hughes, S. S. Jeffers, and Frank Ziriel, Jr. recover of said plaintiff their costs and charges in this behalf expended and have execution therefor."

We have before us the same brief filed by plaintiff in the lower court in which it makes but one point, that finding

to the denial of constitutional rights, as follows:

"1. The judgment notwithstanding the verdict entered herein violated the right to a trial by jury guaranteed the plaintiff by the constitution of the State of Illinois because it was entered upon a finding made by the trial Judge which he had no power or right to make.

2. The judgment notwithstanding the verdict entered herein violated the plaintiff's right to due process of law as guaranteed by the Illinois and Federal Constitutions because it was not entered upon a motion in writing specifying the grounds therefor as provided by the Civil Practice Act and the Rules of the Superior Court of Cook County nor was it supported by any other competent record showing a basis for such judgment."

The first of these questions was decided in the Supreme court adversely to plaintiff. (Foreman State National Bank v. Sistek, 358 Ill. 525.) In the course of its opinion the court said: (pp. 529, 530)

"Before this court will take jurisdiction on the ground that a constitutional question is involved it must appear from the record that a fairly debatable constitutional question was urged in the lower court, the ruling on it preserved in the record for review and the error assigned upon it here. (Cooper v. Palais Royal Theatre, 320 Ill. 41.) The question presented to the court by the appellant's objection to the entry of the final judgment necessarily depended upon the correctness of the court's ruling on the motion for a directed verdict. The correctness of the court's ruling on that point cannot be reviewed by us for three reasons: First, because there is nothing in the record to show that any constitutional question was raised in connection with that motion when made; second, because there is no assignment of error questioning any action of the trial court in connection therewith; and third, because the evidence taken at the trial was not preserved, and the ruling of the court must therefore be presumed to have been correct."

With reference to the second question, it is urged that section 68, par. 1, chap. 110 (Illinois State Bar Stats., 1935), of the Civil Practice act, and not par. 3a, is controlling, and that rule 52, section 1 of the rules of the circuit and superior courts, in force January 1, 1934, is applicable. Par. 1 of sec. 68 is as follows:

"It shall be sufficient for the jury to pronounce their verdict, by their foreman, in open court, without reducing the same to writing if it is a general verdict, and the clerk shall enter the same in form, under the direction of the court; and if either party may wish to move for a new trial or in arrest of judgment or for a judgment notwithstanding the verdict, he shall, before final judgment be entered, or within ten days thereafter, or within such time as the court may allow on motion made within ten days, by himself, or counsel, file the points in writing, particularly

to the denial of constitutional rights, as follows:

"1. The judgment nullifying the verdict entered herein violates the right to a trial by jury guaranteed the plaintiff by the constitution of the State of Illinois because it was entered upon a finding made by the trial judge which he had no power or right to make.

2. The judgment notwithstanding the verdict entered herein violated the plaintiff's rights to due process of law as guaranteed by the Illinois and Federal Constitutions because it was entered upon a motion to nullify specifically the grounds therefor as provided by the Civil Practice Act and the rules of the Superior Court of Cook County nor was it supported by any other competent record showing a basis for such judgment."

The first of these questions was decided in the defendant's favor adversely to plaintiff. (Peterson State National Bank v. Slater, 386 Ill. 388.) In the course of its opinion the court said:

"Before this court will take jurisdiction on the ground that a constitutional question is involved it must appear from the record that a fairly arguable constitutional question was raised in the lower court, the ruling on it presented to the record for review and the error assigned upon it here. (People v. Cicero Liquor Control, 367 Ill. 61.) The question presented to the court by the appellant's objection to the entry of the final judgment necessarily depended upon the correctness of the court's ruling on the motion for a directed verdict. The correctness of the court's ruling on that point cannot be reviewed by us for the reason first, because there is nothing in the record to show that any constitutional question was raised in connection with that ruling when such point present, because there is no assignment of error questioning any action of the trial court in connection therewith; and third, because the evidence taken at the trial was not preserved, and the ruling of the court must therefore be presumed to have been correct."

With reference to the second question, it is urged that section 68, par. 1, chap. 110 (Illinois State Bar Stats., 1933), of the Civil Practice Act, and not par. 3a, is controlling, and that while 32, section 1 of the rules of the circuit and superior courts, in force January 1, 1941, is applicable, par. 1 of sec. 68 is an follows:

"It shall be sufficient for the jury to pronounce their verdict, by their foreman, in open court, without rendering the same to writing if it is a general verdict, and the clerk shall enter the same in form, under the direction of the court; and if either party may wish to move for a new trial or in arrest of judgment or for a judgment notwithstanding the verdict, he shall, before final judgment is entered, or within ten days thereafter, or within such time as the court may allow on motion made within ten days, by himself, or counsel, file the points in writing, particularly

specifying the grounds of such motion, and final judgment and execution thereon shall thereupon be stayed until such motion can be heard by the court."

Section 1 of rule 52 of the Superior court is as follows:

"Motions for new trial, motions in arrest of judgment and motions for judgment notwithstanding the verdict shall be in writing particularly specifying the grounds relied upon in support thereof."

It is argued that since no motion for judgment was made in writing, notwithstanding the verdict specifying the ground therefor, as contemplated by the quoted section of the foregoing statute and rule, the court should not have entered the judgment. We think plaintiff is in error in arguing that the action of the trial court was based upon par. 1 of sec. 68. The proceedings were clearly had under par. 3a of sec. 68, as stated by the Supreme court in its opinion. (Foreman State National Bank v. Sistek, 358 Ill. 525.) Par. 3a provides:

"Hereinafter in all civil actions at law, in courts of record, if either party shall at the close of the testimony, and before the case is submitted to the jury, request the court for a directed verdict in his favor, the court may reserve his decision thereon, and submit the case to the jury under proper instructions as to the law applicable to such case. After the case is thus submitted to the jury, or after receiving and recording the verdict of the jury and before judgment is entered in said case, the court may hear arguments of counsel for and against said request, but in all cases shall receive and record the verdict of the jury as rendered. If the court shall then decide as a matter of law, that the party requesting the directed verdict was entitled thereto, the court shall enter its decision on the record and order judgment in accordance with such decision notwithstanding the verdict entered, and the party against whom such judgment is entered shall have an exception to such action of the court as a matter of course. If such request is denied an exception in favor of the party making such request shall follow as a matter of course."

The proceedings under par. 3a of sec. 68 are entirely separate and distinct from those under par. 1 of the same section. A party desiring to take advantage of its provisions must make his motion for a directed verdict before the case is submitted to the jury, and the court may then reserve its decision on the motion until after the verdict has been returned and recorded. Under this

exercising the powers of such motion, and final judgment and execution thereon shall thereupon be stayed until such motion can be heard by the court."

Section 2 of rule 50 of the superior court is as follows:

"Motions for new trial, motions in arrest of judgment and motions for judgment notwithstanding the verdict shall be in writing specifically constituting the grounds relied upon in support thereof."

It is argued that since no motion for judgment was made in writing, notwithstanding the verdict specifying the grounds therefor, as contemplated by the rules of the superior courts and rule, the court should not have entered the judgment. Its claim plausibly is to enter in argument that the motion of the trial court was based upon Par. 2 of sec. 68. The proceedings were clearly that under par. 3b of sec. 68, as stated by the superior court in its opinion. (Lawson, Trio Finance Corp v. Jordan, 200 Ga. 2[illegible]) Par. 3b provides:

"Nevertheless in all civil actions at law, in courts of record, if either party shall at the close of the evidence, and before the case is submitted to the jury, request the court for a directed verdict in his favor, the court may receive his decision thereon, and submit the case to the jury under proper instructions as to the law applicable to such case. After the case is once submitted to the jury, or after receiving and considering the verdict of the jury and before judgment is entered in said case, the court may hear arguments of counsel for and against such request, but in all cases shall receive and record the verdict of the jury as rendered. If the court shall then decide as a matter of law, that the party requesting the directed verdict was entitled thereto, the court shall enter the decision on the record and order judgment in accordance with such decision notwithstanding the verdict rendered, and the party against whom such judgment is rendered shall have an exception to such action of the court as a matter of course. If such request shall fail on a matter of course."

The proceedings under par. 3a of sec. 68 are entirely separate and distinct from those under par. 3 of the same section. A party desiring to take advantage of its provisions must make his motion for a directed verdict before the case is submitted to the jury, and the court may then reserve its decision on the motion until after the verdict has been returned and received. Under this

paragraph of the section (3a) it is not necessary to specify in writing the points or grounds in support of the motion. When a motion is made to direct a verdict under par. 3a, no verdict of course has been rendered and therefore there is no occasion for asking the court to enter a judgment notwithstanding the verdict. We think that counsel's difficulty arises from a confusion between the power of the court to enter judgment notwithstanding the verdict, as provided in par. 3a, where the motion for a directed verdict was made at the close of the evidence and before the case was submitted to the jury, and a judgment notwithstanding the verdict as contemplated by par. 1 of sec. 68. Clearly this was a judgment entered under the proceedings of paragraph 3a, and not under par. 1 of sec. 68. It was held in Bothwell v. Boston Elevated Ry. Co., 215 Mass. 467, and Kernan v. St. P. R. R. Co., 64 Minn. 312, that under proceedings similar to these the court should enter its judgment as though its decision had been made at the time of the motion to direct a verdict. An examination of the abstract and record in the instant case shows that when defendants made their motion for a directed verdict none of the counts had been dismissed as to any of the defendants, and the question arises whether the court was justified as a matter of law in holding that plaintiff had not produced sufficient evidence to sustain a verdict under the declaration as it then stood.

Plaintiff's principal objection to the judgment order is that it employs the language "The court finds the defendants not guilty," and from this it is argued that the court made a finding of facts which it could not do without invading the province of the jury and violating plaintiff's constitutional right to have the jury pass on the facts. While the order is inaptly drawn, we think it clearly appears from the record and from the whole proceeding that the court, under the provisions of par. 3a, exercised its power of determining whether sufficient evidence had been produced by plaintiff to justify

paragraph of the section (3a) it is not necessary to specify in writing the points or grounds in support of the motion. When a motion is made to direct a verdict under par. 3a, no verdict of course has been rendered and therefore there is no occasion for asking the court to enter a judgment notwithstanding the verdict. We think that counsel's difficulty arises from a confusion between the power of the court to enter judgment notwithstanding the verdict, as granted in par. 3a, where the motion for a directed verdict was made at the close of the evidence and before the case was submitted to the jury, and a judgment notwithstanding the verdict as contemplated by par. 3 of sec. 69. Clearly this was a judgment entered under the provisions of paragraph 3a, and not under par. 3 of sec. 69. It was held in Bothwell v. Boring Drayage Co., 220 Iowa, 647, and Byers v. Ch. R. R. Co., 84 Wisc. 322, that under paragraph similar to Iowa 69, which dealt under the judgment - though the decisions had been made on the line of the motion to direct a verdict, in consideration of the statutory and verbal in the instant case there was sufficient evidence for a directed verdict in favor of the court had been dismissed to be any of the defendants, and the question arises whether the court was justified as a matter of law in holding that plaintiff had not produced sufficient evidence to sustain a verdict under the description as it then stood.

Plaintiff's principal reliance in the judgment order is that it employs the language "the court did not distribute and qualify," and from this it is argued that the court made a finding of facts which it could not do without invading the province of the jury and violating plaintiff's constitutional right to have the jury pass on the facts. While the order is lengthy dicta, it which it clearly appears from the record and from the whole proceeding that the court, under the provisions of par. 3a, exercised the power of determining whether sufficient evidence had been produced by plaintiff to justify

a verdict against defendants, and concluded as a matter of law that plaintiff had failed in this regard. To place any other construction upon the action of the court would render the order itself, and all the proceedings had in the case, meaningless. Whether or not the court erred in granting the motion for a directed verdict is a question upon which we cannot pass, because there is no transcript of the evidence and it will therefore be presumed that the court's ruling was correct.

Accordingly, the judgment of the superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

a verdict against defendants, and concluded as a matter of law that plaintiff had failed in this respect. To place any other construction upon the action of the court would render the order illegal, and all the proceedings had in the case, nonjudicial.

Whether or not the court erred in granting the motion for a directed verdict in a question upon which we cannot pass, because there is no transcript of the evidence and it will therefore be presumed that the court's ruling was correct.

Nevertheless, the judgment of the superior court is affirmed.

AFFIRMED.

Sanders, C. J., and Gilliver, J., concur.

38040

THE WEST SIDE TRUST & SAVINGS BANK, Trustee,
Appellant,

v.

LIQUID CARBONIC CORPORATION, a corporation, and DREXEL ICE CREAM COMPANY, a corporation,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

283 I.A. 634

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in trespass in the Superior court against defendants. Trial was had by jury, resulting in a verdict and judgment against plaintiff, from which this appeal is prosecuted.

It appears from the evidence that on and prior to July 28, 1932, plaintiff, as trustee, held title to the premises in question, located at 4300 South Parkway, in Chicago. The Goodie Gardens, Inc., was in possession of the premises as tenant under a written lease, which began in 1928 and expired in 1934. Tony Gotsis was in charge of the tenant's business as general manager. The premises were occupied partly by Goodie Gardens, Inc., and partly by a subtenant of the lessee, as a drug store.

Peter Giovan, secretary of defendant Drexel Ice Cream Company, held a chattel mortgage on certain fixtures and equipment contained in the premises, dated December 5, 1930. There was a default under the mortgage in March, 1932, and foreclosure was avoided by an agreement between Giovan and Goodie Gardens, Inc., whereby title to the mortgaged chattels was transferred to Giovan in consideration of the cancellation by him of the notes and mortgage, but

Goodie Gardens, Inc., retained possession of the chattels.

Certain other fixtures located in the premises were purchased by Goodie Gardens, Inc., under a conditional sales contract from the other defendant Liquid Carbonic Corporation.

In December, 1931, plaintiff obtained judgment against Goodie Gardens, Inc., for $865, and in July, 1932, a levy was made on certain of the equipment and chattels belonging to Gioven and also certain equipment included in the conditional sales contract of defendant Liquid Carbonic Corporation.

Sale under the levy was held July 21, 1932, and the bailiff sold to plaintiff, but not as trustee, all right, title and interest of Goodie Gardens, Inc., in and to the goods and chattels in the store, most of which were the property of Gioven, for $60.

July 28, 1932, evidently in response to a telephone call from Gotsis, the Liquid Carbonic Corporation sent men and trucks to remove the fixtures and equipment covered by its conditional sales contract, and on the same day defendant Drexel Ice Cream Co., also removed from the store the property covered by the chattel mortgage.

Plaintiff contends that it was in possession of the premises; that neither of the defendants had any right to enter and carry away the property in question; that in so doing they committed a trespass and are liable for both actual and punitive damages. The question of possession was a controverted question of fact, however. Goodie Gardens, Inc., had a lease on the premises which did not expire by its terms until 1934. Plaintiff had brought no action of forcible entry and detainer to regain possession, and its claimed right to possession is based solely on the fact that Gotsis, general manager for Goodie Gardens, Inc., gave a key to the bailiff when the levy was made which the bailiff in turn delivered to plaintiff's attorney after the property was bid in at the sale.

Alschuler v. Schiff, 164 Ill. 298, is cited to sustain

Gaslie Gardens, Inc., retained possession of the premises.

Certain other tenants joined in the premises were pressed to Gaslie Gardens, Inc., with a restraining order restraining from the other defendant liquid carbonic corporation.

On September, 1932, plaintiff obtained judgment against Gaslie Gardens, Inc., for $[illegible], and in July, 1932, a jury verdict on matters of the equipment and chattels belonging to Gaslie and also matters involved in the counterclaim which involved of defendant liquid carbonic corporation.

Date under the jury was held July 22, 1932, and was built? sold to plaintiff, but not as trustee, all right, title and interest of Gaslie Gardens, Inc., in and to the premis and chattels in the state, most of which were the property of others, for $[illegible].

July 28, 1932, eventually in response to a telephone call from Detroit, the liquid carbonic corporation sent men and trucks to remove the fixtures and equipment served by the conditional sales contracts, and on the same day defendant Grand Tor Grove Co., also removed from the store the property levied on by the sheriff [illegible].

Plaintiff contends that it was in possession of the premises; that neither of the defendants had any right to enter and carry away the property in question; that in so doing they committed a trespass and are liable for both actual and punitive damages. The question of possession was a controverted question of fact, however. Gaslie Gardens, Inc., had a lease on the premises which did not expire by its terms until 1932. Plaintiff had brought an action of foreclosure and injunction to regain possession, and its claimed right to possession is based solely on the fact that Gaslie, general manager for Gaslie Gardens, Inc., gave a bill to the plaintiff when the jury was made which the bill? in turn delivered to plaintiff's attorney after the property was put in, at the suit.

Blackmar v. Conkey, 164 Ill. 588, is cited to sustain

plaintiff's position. In that case the tenant under a sealed lease had made an application for repairs. The landlord advised him that he "would not fix anything," and that the tenant could "move out" if he chose, to which the tenant replied "all right, I will take another place and move out." The landlord thereupon told him that it would be "all right." One of the questions presented for review was whether this evidence was admissible to show that a contract under seal had been abrogated, cancelled and surrendered by an executed parol agreement, and the court held that it was proper to submit evidence tending to show a surrender and acceptance to the jury on the question of the surrender of the lease. In that case the tenant gave up the keys and removed all his property from the premises, which presents a different state of facts than the case at bar.

Goodie Gardens, Inc., continued to do business in the premises from the date of the levy until July 21, 1932, the date of the sale, and it remained in possession until July 28, when the property was removed, retaining a key to the premises and leaving therein some of its goods and fixtures not levied upon by the bailiff. There is also evidence that the bailiff's action in delivering a key to Bernstein, attorney for plaintiff, was without the knowledge or authority of Gotsis, the tenant's manager, and we find nothing in the record indicating that Goodie Gardens, Inc., had been released from further payment of rent or that it had removed from the premises the property not levied upon, which still belonged to it. We think these circumstances tend to negative the contention that there was an abandonment of the premises by the tenant or delivery of possession to plaintiff. Moreover, Gotsis denies that he had either surrendered possession of the premises or abandoned the same. He testified that he retained a key to the store with which he opened the door on July 28, 1932, when defendants removed their property,

plaintiff's position. In that case the Second Order of a special Issue had made an qualification for repairs. The Landlord argued his that he "would not its anything," or that the tenant could "move out" if he chose, to which the Court replied "All right, I will take another place and move out." The Landlord threatened but did not in words be "All right." One of the questions presented for review was whether this evidence was admissible to show that a contract under seal had been abrogated, modified and unilateral by an executed parol agreement, and the court held that it was proper to admit evidence tending to show a surrender and acceptance in the jury on the question of the surrender of the Issue. In that case the tenant gave up the keys and removed all his property from the premises, which presents a different state of facts than the case at bar.

Gaulin Gardens, Inc., continued to do business in the premises from the date of the Jury until July 21, 1943, the date of the writ, and it remained in possession until July 28, when the property was removed, without a key to the premises and leaving certain some of the goods and fixtures not levied upon by the Sheriff. There is also evidence that the Sheriff's notice in relinquishing a key to Hennessey, attorney for plaintiff, was without the knowledge or authority of Gaulin. The Court's decision, and we find nothing in the record indicating that Gaulin Gardens, Inc., had been released from further payment of rent or that it had removed from the premises the property not levied upon, which still belonged to it; it did show circumstances that to modify the contention that there was an abandonment of the premises by the tenant or delivery of possession to plaintiff. Moreover, Gaulin denied that he had written authorized possession of the premises or abandoned the premises, the tenant testified that he returned a key to the store with which he opened the door on July 21, that, when Gaulin's manager came that morning,

and his testimony is corroborated by other witnesses.

It is urged by plaintiff that if either defendant had a superior title or right to possession of the property they should have resorted under the statute to a trial of right of property or by replevin to regain possession of their chattels. The remedies suggested, however, were not available to these defendants, because they say they had no knowledge of a levy before sale. Plaintiff argues that knowledge should be imputed to them because the sale was advertised, the store closed and the sale of ice cream by Drexel Ice Cream Co. to Gotsis had been interrupted subsequent to July 21st, the date of the sale. In the face of the positive testimony of defendants denying knowledge, this question, together with others, became one of fact for the jury's determination.

Lastly, it is urged that evidence of the chattel mortgage offered by Drexel Ice Cream Co., and of the conditional sales contract by Liquid Carbonic Company were collateral attacks on the title of plaintiff, and should not have been admitted in evidence. The record discloses that both Gotsis and Gievan, called as witnesses on behalf of defendants, were permitted to testify concerning the chattel mortgage without objection. Therefore, the admission of the mortgage in evidence was merely cumulative of the evidence that the property was mortgaged. Moreover, it is fundamental in an action for trespass that plaintiff must show a right of property in himself and actual or constructive possession thereof, and it was therefore competent for defendants to show, if they could, that plaintiff had no title, by introducing evidence that title was in some other person.

The crux of the controversy between the parties depended principally upon the question of possession of the premises and the manner of entry. Both of these questions were controverted. The court instructed the jury rather fully upon all the issues involved, and no question is raised as to the propriety of the instructions,

and his testimony is corroborated by other witnesses.

It is urged by plaintiff that if either defendant had a superior title or right to possession of the property they should have proceeded under the statute in a bond or right of property or by replevin in regular possession of their counsel. Our remedies suggested, however, were not available to these defendants, because they are not claiming under a levy before us. Plaintiff argues that inasmuch should be imposed to them because the sale was statutorily, the state closed and the sale of lot owned by Ground Ice Cream Co. so should not been interrupted subsequent to July 21st, the date of the sale. In the face of the positive testimony of defendants Douglas Greenhagen, this question, together with others, become one of fact for the jury's determination.

Lastly, it is urged that evidence of the chattel mortgage offered by Grand Ice Cream Co., and of the conditional sales contracts by Lionel Corporation Company were improperly admitted as the title of plaintiff, and should not have been admitted in evidence. The round discharges and both Potsis and Glover, called as witnesses on behalf of defendants, were permitted to testify concerning the chattel mortgage without objection. Therefore, the admission of the mortgage in evidence was merely cumulative of the evidence that the property was mortgaged. Moreover, it is fundamental in an action for trespass that plaintiff must show a right of property in himself and actual or constructive possession thereof, and if not defendants can plead, for defendants to show, if they could, that plaintiff had no title, by introducing evidence that title was in some other person.

The area of the controversy between the parties depended primarily upon the question of possession of the premises and the manner of entry. Both of these questions were controverted. The court instructed the jury rather fully upon all the issues involved, and no question is raised as to the propriety of the instructions.

either given or refused. The court also included in its charge to the jury the rule governing the measure of damages in the event the jury should find for plaintiff. There is no contention that the case was unfairly tried, or that any error was committed by the court except on the admissibility of the chattel mortgage and conditional sales contract. Under these circumstances we think the salient points of controversy in the case were principally questions of fact which the jury determined adversely to plaintiff. From a careful examination of the record we believe the verdict of the jury is amply sustained by the evidence. Accordingly, the judgment of the superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

rather given or refused." The court is related in its charge to the jury the rule governing the exercise of judgment in the event the jury should find for plaintiff. There is no contention that the said was actually filed, or that any error was committed by the court subject to the consideration of the related motions and instructions and contrary. Under these circumstances we think the ultimate points of consequence in the case are substantially questions of fact which the jury determined adversely to plaintiff. Upon a careful consideration of the record we believe the verdict of the jury is amply sustained by the evidence. Accordingly, the judgment of the superior court is affirmed.

Concur.

Dunlap, P.J., and Gilliam, J., concur.

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38069

ANNE STONEBERG,
Appellee,

v.

RICHARD H. SPOO,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

283 I.A. 634

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action at law to recover for personal injuries sustained as a result of an automobile accident, joining Richard H. Spoo and Blue Cab Company, a corporation, as defendants. Trial was had by jury resulting in a verdict for plaintiff and against both defendants, in the sum of $2,000. After verdict, but before judgment, Blue Cab Co. paid plaintiff $1,000, and took from her a covenant not to sue and a stipulation to dismiss it as a defendant. Thereupon, with the consent of plaintiff, the court ordered a remittitur of $1,000, and entered judgment for $1,000 against Spoo alone, from which he prosecutes this appeal.

No question is raised as to the pleadings. The accident occurred on the evening of October 21, 1933. The defendant, Richard H. Spoo, was driving south on Marion street, Oak Park, Illinois, in a Chevrolet sedan, with his sister, Lois Spoo. When he approached the north side of Lake street he came to a stop, pursuant to a red light on the stop and go light directing north and southbound traffic along Marion street. When the stop and go light changed to green for traffic moving north and south along Marion street Spoo proceeded across Lake street. According to all the evidence he was driving slowly, and as he testified was proceeding in second gear while crossing.

Marion street at its intersection with Lake street jogs to the east, so that the east curb of Marion street, north of Lake street, is on a line with the west curb of Marion street south of Lake street. According to Spoo's testimony he was proceeding south on Marion street across Lake street, jogging to the left, when he observed plaintiff crossing Marion street on the south side of Lake street, walking east. She was then past the middle of the street and had proceeded beyond the path of his car. At that moment an automobile on Marion street south of Lake street, proceeding north, broke out of the line of cars and as it came toward plaintiff she suddenly stepped back into the path of Spoo's car, without looking back and without any warning to Spoo who applied his brakes at once and came to a stop. Almost immediately thereafter the cab, operated by defendant Blue Cab Company, coming from behind, collided with the rear of Spoo's car, pushing it forward several feet. Plaintiff was struck by Spoo's car, thrown to the pavement, and injured. Spoo insists that he came to a complete stop when plaintiff suddenly stepped into the path of his car, and that the injury was caused by the impact of the Blue Cab Company's car against the rear of his automobile, pushing it forward several feet upon and against plaintiff. Plaintiff, on the other hand, contends and charges in her complaint that Spoo, through the negligent manner in which he was operating his automobile, struck plaintiff before the collision between the Blue Cab Company car and Spoo's automobile.

Plaintiff testified that as she crossed Marion street she looked toward a stop light located on the southeast corner of the intersection, and that this light was green for east and west traffic. According to her own testimony she looked neither to the northeast nor north. It appears from the record that there is no traffic light at the southeast corner of the intersection of Marion and Lake streets which can be green for east and west traffic. From a photograph re-

Another point is the interpleading with John Adams Jr. to the suit, in that the back wall of Marion avenue, north of Lake street, is on a line with the back wall of Marion avenue south of Lake street. Proceeding in Opp's testimony he was proceeding north on Marion avenue from Lake street. Jacobs in the lot, then he observed plaintiff coming South along on the south side of Lake street, walking east. He was then past the middle of the street and had proceeded beyond the peak of his car. At that moment an automobile on Marion avenue south of Lake street, proceeding north, broke out of the line of cars and as it came toward plaintiff she suddenly stepped back into the path of Opp's car, without looking back and without any warning to Opp who applied his brakes at once and came to a stop. Jarvis immediately thereafter the cab, operated by defendant Blue Cab Company, coming from behind, collided with the rear of Opp's car, pushing it forward several feet. Plaintiff was struck by Opp's car, knocked to the pavement, and injured. Opp testifies that he came to a complete stop when plaintiff suddenly stepped into the path of his car, and that the injury was caused by the impact of the Blue Cab Company's car against the rear of his automobile, pushing it forward several feet upon and against plaintiff. Plaintiff, on the other hand, contends and charges in her complaint that Opp, through the negligent manner in which he was operating his automobile, struck plaintiff before the collision between the Blue Cab Company car and Opp's automobile.

Plaintiff testified that on the crossed Marion street she looked toward a stop light located on the southeast corner of the intersection, and that this light was green for east and west traffic, assuming to her own testimony she looked neither to the northbound nor north. It appears from the record that there is no traffic light at the southeast corner of the intersection of Marion and Lake streets which can be green for east and west traffic. From a photograph re-

received in evidence it appears that the stop and go light located at that point has only two sides, which face north and south respectively; it does not contain any lights to regulate east and west traffic. The light is located on the east side of Marion street in front of a fruit store on the corner, and, as shown by the photographer in evidence, it affords no indication to a person proceeding in an easterly direction on Lake street as to whether the signal light for north and south traffic is red or green. If plaintiff was able to observe a green light, as she testified, it must have been a signal for traffic to proceed north and south. Some five or six witnesses testified that the traffic lights were green, in favor of Spoo, as he crossed and at the time of the accident, and plaintiff was the only witness who testified otherwise.

According to the uncontroverted evidence Spoo was driving slowly. He testified that he was not exceeding 15 miles an hour. The driver of the Blue cab immediately behind him, who was also crossing with the green light, stated that he followed Spoo driving about 10 miles an hour, and that Spoo was proceeding only slightly faster. It is also conceded that upon the approach of a car from the south plaintiff stepped back in the line of Spoo's path and that the accident occurred almost instantly thereafter. Spoo insists that he was in the exercise of extreme care in crossing; that he had stopped at the intersection of Lake street in obedience to a red light signal, and after the lights changed to green had proceeded slowly across Lake street and saw plaintiff on the south side of the street; that she had crossed the path of his car before he reached the east and west crossing on the south side of Lake street and when she suddenly stepped back into the path of his car he came to an immediate stop, thus doing everything which could be expected of him in the exercise of due care and caution; and that but for the impact of the cab behind him, plaintiff would not have been injured.

From a careful examination of the record we are unable to find any evidence of negligence on the part of defendant Spoo, which could properly be submitted to the jury. Plaintiff was obviously mistaken when she testified that "there was the usual type of stop and go light which operates automatically with red, green and yellow or orange changing light," for the photograph in evidence clearly shows that it was not the usual type of stop and go light. It had lights on two sides only, facing north and south. Its east and west sides are smooth surfaces, containing no lights whatsoever. She was likewise obviously mistaken in stating that "I was crossing with the green light in front of me." If she did see a green light, it must have been the one signalling north and south traffic to proceed, and the only possible inference to be drawn from her testimony is that she crossed Marion street against the traffic signal for east and west traffic and that in doing so she was negligent.

Plaintiff's counsel lays great stress upon the contention that Spoo's car struck plaintiff before its rear-end collision with the Blue Cab Company's cab, and from this it is argued that it was Spoo's negligence which injured plaintiff rather than the impact of the cab in the rear, which Spoo testified pushed him several feet forward and against plaintiff. Several witnesses, including one who testified for plaintiff, stated that they heard a collision and almost instantly saw plaintiff fall to the pavement. Spoo and his sister, Lois, both testified that his car came to a full stop when plaintiff stepped back into his path of travel and that plaintiff was struck only after the impact with the cab in the rear. In our view of the case the determination of this controverted fact is not controlling. If, as the undisputed evidence clearly indicates, Spoo was crossing Lake street slowly and carefully with the traffic signals, with his car under control, and stopped instantly when plaintiff stepped back

From a careful examination of the record we are unable to find any evidence of negligence on the part of defendant Lane, which could properly be submitted to the jury. Plaintiff was obviously mistaken when she testified that "there was the usual type of stop and go light which operates automatically with red, green and yellow or orange changing light," for the photograph in evidence clearly shows that it was not the usual type of stop and go light. It had lights on its sides only. During daytime the usual lit such and west sides are always unlighted, containing no lights whatsoever. She was likewise obviously mistaken in stating that "I was crossing with the green light in front of me." If she did see a green light, it must have been the one alternating north and south traffic to proceed, and the only possible inference to be drawn from her testimony is that she crossed Sutter street against the traffic signal for east and west traffic and that in doing so she was negligent.

Plaintiff's counsel laye great stress upon the contention that Lane's car struck plaintiff before she traversed collision with the Blue Cab Company's cab, and from this it is argued that it was Lane's negligence which injured plaintiff rather than the impact of the cab in the rear, which Lane testified pushed him several feet forward and against plaintiff. Several witnesses, including one who testified for plaintiff, stated that they heard a collision and almost immediately saw plaintiff fall to the pavement. Lane and his alleged, both testified that his car came to a full stop when plaintiff stepped back into his path of travel and that plaintiff was struck only after the impact with the cab in the rear. In our view of the case the determination of this controverted fact is not controlling. If, as the uncontradicted evidence clearly indicates, Lane was crossing Lake street slowly and cautiously with the traffic signals, with his car under control, and stopped instantly when plaintiff stepped back

into his path of travel without warning, while crossing a busy highway against traffic signals, he did all that any reasonably prudent person would or should have done and it would be immaterial, as a matter of law, whether she was struck before or after the collision of the two cars. To charge him with negligence under the circumstances would be to hold him an insurer, and this is not the law. We think plaintiff's negligence in crossing against traffic signals and failing to look or warn Spoo before stepping backward into the path of his car was the proximate cause of her injuries. Taking the evidence adduced upon the hearing in the light most favorable to plaintiff we fail to find therein any evidence of negligence on the part of defendant Spoo.

At the close of plaintiff's case, and again at the close of all the evidence, Spoo made a motion for a directed verdict, which the court took under advisement. After the verdict had been returned, the court denied Spoo's motion. Sec. 68 of the Civil Practice act, (chap. 110, Ill. State Bar Stats., 1935), provides:

"(3) (b). If the party against whom the verdict of the jury was rendered shall assign error in the Appellate or Supreme Court upon the refusal of the trial court to direct a verdict in his favor or to order judgment entered notwithstanding the verdict, and the Appellate or Supreme Court shall be of opinion that the trial court committed such error, the decision of the trial court shall be reversed and judgment shall be entered or ordered by the Appellate or Supreme Court notwithstanding the verdict, unless it shall appear that there was such error on the trial as would have entitled the party in whose favor the verdict was rendered to a new trial if such verdict and judgment had been adverse to such party, in which case a new trial shall be ordered. * * *."

Sec. 92, (1), (f), of the same act contains the following provision:

"(1) In all appeals the reviewing court may, in its discretion, and on such terms as it deems just, -

(f) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require."

into his pick of proof without testing, while producing a hasty
blight against battle objects, by its activity and reasonably
prudent person could or should have done, but it could be insufficient,
as a matter of law, should the jury believe we affirm the
sufficiency of the evidence. To charge him with negligence under the
circumstances would be to hold him an insurer, and this is not the
law. We hold plaintiff's negligence in operating against battle
signals and failing to look or wait lest before stepping onward
into the path of his car was the proximate cause of the injuries.
Taking the evidence adduced upon the hearing in the light most
favorable to plaintiff, we fail to find therein any evidence of negligence on the part of defendant.

As the claim of plaintiff's case, and again at the close
of all the evidence, was made a motion for a directed verdict,
which the court was asked to give, defendant the verdict had been
returned, the court denied defendant's motion. See, 55 of the Civil
Practice Act, (Chap. 110, Ill. Stats Ann Stats., 1959), provides:

"(2) (a). If the party against whom the verdict of the jury was rendered shall move at the conclusion of the evidence for the entry of the trial court to direct a verdict in his favor or to enter judgment notwithstanding the verdict, and the motion or motions shall be of grounds that the trial court committed error, the decision of the trial court may be reversed and judgment shall be entered or ordered by the reviewing or appellate court notwithstanding the verdict, unless it shall appear that there was such error on the part of the trial court as would have entitled the party to have the verdict set aside and a new trial granted, or that the trial court should have granted a new trial, in which case a new trial shall be ordered, or as to such party, in which case a new trial shall be ordered, as the case may require."

Sec. 55, (2), (b), of the same act provides the following procedure:

"(2) In all appeals the reviewing court may, in its discretion, and in such form as it deems just, -

(1) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the entry of a partial new trial, the entry of a judgment, or the issuance of mandamus, as the case may require."

We think the court should have directed a verdict for Spoo, or granted his motion for judgment notwithstanding the verdict, upon the facts of the case, and its failure to do so constituted error.

Judgment of the circuit court will therefore be reversed without remanding and judgment entered here in favor of defendant Spoo and against plaintiff, pursuant to the foregoing provisions of the Civil Practice act.

REVERSED WITHOUT REMANDING AND JUDGMENT HERE IN FAVOR OF DEFENDANT, SPOO, AND AGAINST PLAINTIFF.

Scanlan, P. J., and Sullivan, J., concur.

33 1

38082

MARIE LARSEN,
Complainant,

v.

SAMUEL FOX et al.,
Defendants.

W. O. DICUS,
Appellant,

v.

MARIE LARSEN and OTTO C. RENTNER,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 634

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

January 16, 1926, a decree was entered in the circuit court in the case of Marie Larsen v. Samuel Fox et al., which found that there was due Marie Larsen, the complainant, the sum of $292.50 principal, together with interest thereon, and provided:

"That the said complainant, Marie Larsen, has a valid lien upon said premises for said amounts hereinbefore specified for the said sums and interest thereon amounting to Two Hundred Ninety-two and 50/100 ($292.50) Dollars, and for her solicitor's fees herein in the amount of Three Hundred ($300.00) Dollars, and for court costs herein taxed at Forty-two and 80/100 ($42.80) Dollars. * * *"

Subsequent to the entry of the decree, Mollie Weinberg, one of the defendants, filed a bill of review in the circuit court, as a result of which the original decree was set aside. On appeal to this court the second decree was reversed, leaving the original decree in full force and effect.

Meanwhile the term of the master who had been directed to sell the premises expired and Otto C. Rentner, appellee herein, was

[illegible]

[illegible]

[illegible]

directed to make the sale under the original decree. He proceeded so to do and received the sum of $1,030.25.

September 25, 1934, after the sale by the master, and more than eight years after the decree was entered, W. O. Dicus filed a petition in the proceeding, setting forth substantially the foregoing facts and praying that defendants be required to answer the petition within a short day and that the master be directed to pay him the sum of $300 from the proceeds of the sale.

Rentner answered the petition, stating that he had on hand $1,030.25 and averring that the decree under which he had made the sale provided:

"That said master, out of the proceeds of saie sale, retain his fees, disbursements and commissions herein, and pay to the officer of this court the costs in this cause taxed herein at $42.80, and out of the remainder pay to the complainant the amount of this decree found to be due her, with interest thereon at the rate of 5% per annum from the date of this decree to the date of such sale."

Marie Larsen filed her answer to the petition stating that Earl J. Walker, who represented her in the original proceeding, had abandoned the case when the bill of review was filed and suggested that she employ other counsel, and averred that Walker was not to be paid except upon collection and that there was nothing due him for attorney's fees.

October 17, 1934, the chancellor dismissed the petition of Dicus and this appeal followed. Subsequent to the dismissal of the petition the master paid the moneys on hand to Marie Larsen, as directed by the decree.

Dicus' claim to $300 is based upon an assignment from Earl J. Walker, dated September 18, 1934, as follows:

"Witnesseth, Whereas the said party of the first part (Earl J. Walker) on the day of _____ One Thousand _____ recovered a Decree in the case of Marie Larsen against Nollie Weinberg for Solicitor's fees of Three Hundred Dollars, as will by the record thereof more fully appear * * * has sold, assigned, transferred and set over, and by these presents do ___sell, assign, transfer and set over unto said party of the second part (Dicus) and his assigns, the said judgment."

directed to make the main main the original decree. He proceeded so to do and received the sum of $1,000.00.

September 22, 1924, after the order by the master, but more than eight years after the decree was entered, T. E. Shaw filed a petition in the proceeding, setting forth substantially the foregoing facts and praying that defendants be required to answer the petition within a short day and that the master be directed to pay him the sum of $200 from the proceeds of the sale.

Jessie answered the petition, pleading that he had on June 21,1924, and receiving that the decree main claim be let upon the main premises.

"That said master, out of the proceeds of said sale, paid his fees, disbursements and commissions herein, and pay to the attorney of this court the costs in this cause taxed herein at $40.00, and at the remainder over to the complainant the amount of this decree found to be due her, with interest thereon at the rate of 6% per annum from the date of this decree to the date of such sale."

Marie Larson filed her answer to the petition showing that Earl T. Walker, who represented her in the original proceeding, had abandoned the case when the bill of review was filed and suggested that she employ other counsel, and averred that Walker was not to be paid except upon ratification and that there was nothing due his for attorney's fees.

October 17, 1924, the chancellor dismissed the petition of Shaw, and this appeal followed. Subsequent to the dismissal of the petition the master paid the money on hand to Marie Larson, as directed by the decree.

Shaw claims he DOES be based upon an assignment from Earl T. Walker, dated September 22, 1924, as follows

"Whereas, Thereon the sum jurisdiction of the lien upon Earl T. Walker] on the day of _____ the Shawsend Respondent a Decree in the case of Marie Larson against Jessie Larson Walker for Defendant's fees of Three Hundred Dollars, as will by the record thereof more fully appear, = = = and said, Solicitor, Attorney and not any case not jurisdiction of the second part [illegible] and his assigns, the said Respondent,"

It is urged on behalf of Dicus that the chancellor had power to change the decree after term time and should have modified it so as to require the master to pay him $300 with interest; that Marie Larsen had no interest in the $300 which had been awarded her as solicitor's fees; that it rightfully belonged to her solicitor and should have been paid to his assignee; and that the sum "was ill-gotten gains to her."

We see no merit in that contention, for the decree expressly found that there was due Marie Larsen $592.50 and costs, including the sum of $300 allowed as solicitor's fees, and it provided that the defendants pay her the sum of $592.50 with interest. It is therefore obvious that Earl J. Walker at the time of the assignment had nothing to assign, because under the decree nothing was to be paid him nor was anything apparently due him, for Walker, who testified on behalf of Dicus upon the hearing on the petition, stated that he was solicitor for Marie Larsen in the proceeding in which $300 was allowed "to complainant" for solicitor's fees. He did not state, however, that he had not been paid for his services or that anything was due him from Marie Larsen. Marie Larsen's answer specifically denied that there was anything due Walker for attorney's fees.

Dicus' brief cites several cases purporting to hold that a court of equity has jurisdiction to amend its decree after the term in so far as the change affects only the method of enforcement and not the merits of the suit. One of the cases cited is Madison & Kedzie State Bank v. Corrugating Co., 265 Ill. App. 503. That case was later taken to the Supreme court by certiorari (351 Ill. 180), and it was there held that "after the term of court had adjourned the court had no jurisdiction to review and correct or change those orders under the so-called petitions of defendants in error. * * *" In discussing the question here under consideration, the court said: (p.191)

It is hardly an exhibit of blame that the commissioner had power to change the decree after this time and should have modified it so as to provide the money to pay his fees with interest that Maria Lorenz had an interest in the fund which has been created for a solicitor's fees; that it clearly belongs to the solicitor and should have been paid to him originally and that he was "entitled thereto prior to her."

We see no merit in that contention, for the decree expressly states that Lorenz was the duly licensed attorney, including the sum of $200 allowed as solicitor's fees, and it provides that the defendants pay her the sum of $202.50 with interest. It is therefore obvious that Earl J. Walker at the time of the assignment had nothing in dispute, because under the decree nothing was to be paid him nor was anything apparently due him. To Walker, the beneficiary, he should at most look upon the learning on the petition, stated that he was solicitor for Maria Lorenz in the proceeding in which $200 was allowed "in compliance" for solicitor's fees. He did not state, however, that he had not been paid for his services or that anything was due him from Maria Lorenz. Maria Lorenz's answer specifically denies that there was anything due Walker for attorney's fees.

Plaintiff's brief cites several cases purporting to hold that a court of equity has jurisdiction to award its decree after the term is so far as the change affects only the method of enforcement and not the merits of the suit. One of the cases cited is Madison S. Kadwa (this Ct.) v. Jurgensmeier Co., 88 Ill. App. 500. That case was later taken to the Supreme Court by writ of error (215 Ill. 1901) and it was there held that after the term of court had adjourned the court had no jurisdiction to review and correct or change those orders under the peculiar circumstances of that case. In our opinion, the decision regarding the jurisdiction only under consideration, the court said: (p.207)

"Those decretal orders were under the control of the court during the term at which they were entered, and might have been modified, set aside or vacated during the term they were entered, or subsequently, upon motion made during the term and continued to a subsequent term. After the term expired the court was without power to change or modify the orders except as to matters of form or mere clerical errors or misprisions of the clerk, and the court was without power to set aside, vacate or annul the orders, as they were final and appealable orders. Relief against the decretal orders could only have been obtained by appeal or writ of error if the errors were apparent on the face of the record, and if not, by bill of review or bill to impeach the decree for fraud or other sufficient cause. Tosetti Brg. Co. v. Koehler, 200 Ill. 369."

Metropolitan Trust Co. v. Perry, 194 Ill. App. 277, is cited also. In that proceeding one of the litigants had paid the master an amount requested by him as his fees. The decree entered in the case did not fix the master's fees, and a petition was filed to require the master to pay back some of the money paid him, and the court so ordered.

In Finn v. Wetmore, 212 Ill. App. 550, another case relied on by Dicus, a decree of foreclosure was entered requiring a master to pay to the holders of bonds described in the trust deed being foreclosed the sum of $304.01 for each bond, from the proceeds of the sale. Defendant in error held seven bonds, and first learned of the foreclosure suit several years after the decree had been entered. She then presented her bonds to the master in chancery, who failed to pay her as provided in the decree. She thereupon filed a petition seeking an order on the master to pay her the amount due on her bonds, and the court so ordered. In entering an order on the petition the court was not attempting to modify the decree in any particular, but merely entered a supplemental order to enforce the decree, which presents an entirely different situation. Had the chancellor in the instant case granted the prayer of the petition and ordered the master to turn over to Dicus the $300 allowed Marie Larsen as solicitor's fees, he would have had to disturb the findings of the decree and modify its terms. This the court could not do eight years after the decree was entered. (Madison & Kedzie State Bank v.

"These interlocutory orders were under the control of the court during the term in which they were entered, and might have been modified, or stricken or vacated during the term they were entered, or thereafter, upon notice being served the law and continued as a mandatory writ. After the term expired the court was without power to alter or modify the orders except as to matters of form or such clerical errors or misprisions of the clerk, or the court was without power to set aside, vacate, or amend the orders, or any part thereof, except upon a writ of error duly prosecuted or writ of error in the orders were apparent on the face of the record, and it was, by bill of review or by the remedy the means for fraud or other sufficient cause. Bennett Bro. Co. v. Bennett, 288 Ill. 328."

Rotenmeister First Co. v. Fuller, 144 Ill. App. 477, is cited also. In that proceeding one of the litigants had paid the master an amount requested by him as his fees. The decree ordered in the case did not fix the master's fees, and a petition was filed to require the master to pay back some of the money paid him, and the court so ordered.

In Ellis v. Wagner, 242 Ill. App. 380, another case relied on by Diaz, a decree of foreclosure was entered requiring a master to pay to the holders of bonds described in the court decree being foreclosed the sum of $[illegible] for each bond, from the proceeds of the sale. Instead of error bulk seven bonds, and first learned of the foreclosure sale several years after the decree had been entered. The lien presented her bonds to the master in chancery, the failed to pay her as provided in the decree. The thereupon filed a petition requiring an order on the master to pay her the amount due on her bonds, and the court so ordered. In entering an order on the petition the court was not attempting to modify the decree in any particular, but merely ordered a supplemental order to enforce the decree, which presents an entirely different situation. Had the appellee in the instant case granted the prayer of the petition and ordered the master to turn over to Diaz the $[illegible] allowed Davis Tarpey as solicitor's fees, he would have had to disturb the findings of the decree and modify the terms. This the court could not do [illegible] years after the decree was entered. (Mullins v. Ewing, [illegible]).

Corrugating Co., 391 Ill. 180.) Moreover, Dicus was not a party to the original suit, nor was Walker, through whom he claims, and we think the chancellor properly denied the petition.

For the reasons stated the order of the circuit court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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38093

THE MINUTE FREEZER CORPORATION,
a corporation,
Plaintiff in Error,

v.

ALLIANCE CASUALTY COMPANY,
a corporation,
Defendant in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

283 I.A. 634

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an action of assumpsit in the circuit court against defendant as surety on a contract performance bond. The case was tried by the court without a jury, resulting in a finding of the issues and judgment in favor of defendant, for the reversal of which plaintiff has sued out this writ of error.

The essential facts disclose that in the summer of 1930 plaintiff, an Illinois corporation, owned letters patent on a metal device intended for use in freezing ice cream and fruit juices. Its claimed utility lay in its capacity to complete the freezing process within the period of one minute. None of the patented freezers had been manufactured for sale in the market, nor had dies suitable for factory production of the freezer been designed or made.

In April, 1930, one Gobberdiel, acting for plaintiff, called on Hudson A. Tedman, mechanical engineer located at Galesburg, Illinois, and there engaged in the manufacture of dies, tools and shop equipment, and discussed with him the Minute Freezer and the contemplated design of suitable dies for its manufacture and the ultimate marketing of the device. Prior thereto plaintiff had had no business relations with Tedman, and the latter did not know any of plaintiff's officers or agents. As a result of this interview Tedman came to Chicago where

Plaintiff filed an notice of nonpayment in the circuit court against defendant on surety on a contract performance bond. The case was tried by the court without a jury, resulting in a finding of the issues and judgment in favor of defendant, for the reversal of which plaintiff has sued out this writ of error.

The essential facts disclose that in the course of his business, an Illinois corporation, owned letters patent on a metal device intended for use in freezing ice cream and fruit juices. He claimed utility Jay in its capacity to complete the freezing process within the period of one minute. Some of the product freezers had been manufactured for sale in the market, but had this validity for factory production of the freezer been demonstrated or made.

In April, 1952, one [illegible], acting for plaintiff, talked on Edmon A. Tadman, mechanical engineer Lincoln in Chicago, Illinois, and there engaged in the manufacture of dies, tools and drop equipment, and discussed with him the Jimmie Freezer and the contemplated design of suitable dies for its manufacture and the ultimate availability of the device. Prior thereto plaintiff had had no business relations with Tadman, and the latter did not know any of plaintiff's officers or agents. As a result of this interview Tadman came to Chicago where

he interviewed S. J. Rosenthal, plaintiff's agent, who inquired about the price of dies and matters pertaining to the cost of manufacture. Tedman agreed, upon his return to Galesburg, to study the die requirements of plaintiff and submit a proposal for their manufacture. At that time detailed specifications for the freezer had not been drawn, and it was evidently the expectation of both Tedman and Rosenthal that by united study of the problem a satisfactory freezer could be designed.

Witnesses claiming to have expert knowledge of dies and their use by manufacturers testified in substance that a die is a tool by which a piece of metal is formed into a definite shape. The die consists of a male and female part. The male part is attached to the moving and upper portion of the press, while the female part is secured by means of bolts to the lower and immovable platform-like portion of the press. Sheet metal is inserted between the upper and lower die parts, and upon application of force through the movable part of the press the male portion of the die is brought into contact with the metal, thereby forcing it into the female portion of the die. The metal is thus shaped into the peculiar form of the dies. Witnesses testified that dies may be either large or small, depending upon the dimensions of the manufactured parts, and that presses are likewise of many sizes and shapes, which cannot be modified or changed to receive dies. It is therefore necessary for the die maker to know the size and shape of the particular presses in order that he may make the dies to fit them. These predetermined dimensions are called "shop requirements." The absence of uniformity among manufacturers as to press equipment excludes the use of dies made for the presses of one manufacturer in the presses of other shops.

Following the conference between Rosenthal and Tedman in April, 1930, another meeting took place in Rosenthal's office in Chicago the first week in May of that year. The parties had then

In interview b. 1. Interview, plastically speaking, one inquired about the price of this not matters particularly in the case of manufacture. Tanner agreed, upon his return to Edinburgh, to study the die requirements of plastically and submit a proposal for their manufacture. It also also detailed specifications for the tracer had not been drawn, and it was evidently the expectation of both firms and necessitated that by mutual study of the problem a satisfactory tracer could be designed.

Tracers eliminate in such engraving techniques of this nature that was by manufacturers built in substance that a die is a tool by which a piece of metal is turned into a relative shape. The die consists of a male and female part. The male part is attached to the moving and upper portion of the press, while the female part is secured by means of bolts in the lower and immovable plate-like portion of the press. Some metal is inserted between the upper and lower die parts, and upon application of force through the movable part of the press the male portion of the die is brought into contact with the metal, thereby forcing it into the female portion of the die. The metal is thus shaped into the peculiar form of the die. Tracers indicated that dies may be either large or small, depending upon the dimensions of the manufactured parts, and that presses are likewise of many sizes and shapes, which would be modified as changed to receive dies. It is therefore necessary for the die maker to know the size and shape of the particular presses in which he may make the dies to fit them. These professional discussions are called "shop requirements." The chemist of multicolor engraving manufacturers in Jersey mechanical assistant the use of dies made for the purpose of one manufacturer in the process of other shops.

Including the manufacturer Brown's Brooklyn and Tanner in April, 1930, another meeting took place in Donnelly's office in which the first week in July of this year. The position had that

formulated ideas as to the shape, size and other characteristics of the freezer, and desired to formulate engineering specifications for its production and to agree upon the price of the dies. Tedman pointed out to Rosenthal the necessity of knowing the size and shape of the particular presses to be used in the manufacture of the freezers, in order that he might make the dies to fit, and the consequent necessity of securing a manufacturer before completing the drawings for the dies to be used in the manufacture of the freezers. It appears that Tedman had previously designed and made dies for the Berstad Manufacturing Company, of Clearing, Illinois, and he suggested that plaintiff make arrangements with the Berstad Company for the manufacture of the freezers. This suggestion led to a conference between Rosenthal and Gobberdiel on behalf of plaintiff, Tedman and representatives of the Berstad Company, wherein the technical phases of factory production of the freezers was considered. Evidently acting upon the assumption that the Berstad Company would manufacture the freezers for plaintiff, Tedman directed his draftsman to proceed with the work of making detailed drawings, and outlined in a letter to Rosenthal the terms upon which he would make the dies. Thereafter, on May 15, 1930, the parties entered into a contract which required plaintiff to pay Tedman $5,000 for designing and constructing dies suitable for the manufacture of all freezer parts, which were enumerated in a schedule attached to the contract. The contract contained a recital that the consideration of $5,000 to Tedman had been paid in full, "the receipt whereof is hereby acknowledged by the party of the second part." This recital was apparently untrue, because Tedman was actually paid only $1,000 in cash and received the unsecured non-negotiable principal promissory notes of Rosenthal aggregating $4,000, which were never paid, and a check for $4,000 which was never cashed. By the terms of the agreement Tedman was required to complete the tool

financial loss or to the theory also not under consideration of the Theatre, and desired to provide adjustment possibilities for the production and to agree upon the price of the film. Tamen pointed out to Danielli the necessity of keeping the size and shape of the particular process to be used in the manufacture of the films, in order that he might make the film in 1?, and the producers agreed generally at leaving a manufacturer better equipped the design for the film to be used in the manufacture of the Theatre. It appears that Tamen had previously designed and made film for the Zurich Musikverzeichnung-Company, of Switzerland, and he suggested that plaintiff make arrangements with the Zurich Company for the manufacture of the Theatre. This suggestion had in a letter Danielli Tamen Technical and commercial on behalf of plaintiff, Tamen and representatives of the United Company, outside the technical phase of Company production of the Theatre was manufacture. Generally acting upon the assumption that the Zurich Company would manufacture the Theatre for plaintiff, Tamen directed his attention to proceed with the work of making detailed drawings, and realized in a letter to Danielli the terms upon which he would make the film. Thereafter, on July 17, 1927, the parties entered into a contract which required plaintiff to pay Tamen $7,000 for designing and constructing film suitable for the manufacture of all Theatre pictures, which were commercial of a technical standard to the contract. The contract contained a provision that the consideration of $7,000 to Tamen for their plan in full, "the receipt thereof is hereby acknowledged by the party of the second part." This provided one exclusively motion, because Tamen did actually pay only $1,000 to and retained the remaining $6,000 payable upon delivery of "Successful approving ($1,000, which were never paid, and a check for $6,000 which was never mailed. By the terms of the agreement Tamen was required to complete the first

equipment within sixty days and to design and cut the dies so as to "conform in every respect to the shop requirements of said Barsted Company for the manufacture of said Minute Freezers." The contract further required Todman to furnish a contractor's completion bond. Accordingly he made application to defendant for such a bond, and in connection with his application exhibited his contract with plaintiff. Defendant executed the bond as surety May 6, 1930, and it was thereafter delivered to plaintiff. The bond contains the following material conditions:

"1. The Obligee shall, at the times and in the manner specified in the contract, fully comply with all the terms thereof, and if the Obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the Surety shall thereupon be relieved of all liability hereunder.

"2. If the Principal shall in any manner default in the performance of any matter or thing specified in the contract, or if the Principal shall abandon the work provided in the contract on the part of the Principal to be done, the Obligee shall immediately so notify the Surety at its Home Office in the City of Philadelphia, Pennsylvania, * * *.

"* * *

"4. If any changes or alterations by the Principal or Obligee shall be made in the plans or specifications for the work described in the contract, the Obligee shall immediately notify the Surety thereof, giving a description and stating the amount of money involved by such changes or alterations. * * *

"* * *

"6. This bond does not apply to nor cover guarantees of the work specified in the contract; * * * nor for damages caused by delay in completing the work except such damages as have actually been sustained and proved, but in no event in excess of 10% of the penal amount of this instrument.

"7. * * * nor shall the Surety be liable hereunder unless the consideration paid by the Obligee to the Principal for the performance of the contract shall be cash.

"8. None of the conditions or provisions contained in this bond shall be deemed waived or altered by the Surety unless the written consent to such waiver or alteration be duly executed by its President or a Vice-President and its seal be thereto affixed and duly attested; * * *.

"9. All notices and other evidence required by this bond to be furnished by the Obligee to the Surety shall be in writing and shall be forwarded by registered mail to the Surety at its principal office in Philadelphia, Pennsylvania."

equipment within sixty days prior to trial and yet the also as we to "conform in every respect to the duty requirements of such Infrared Company for the manufacture of said Night Dragons." The contract further requires Tucker to furnish a contractor's engineer hereunder in such application as determined by such a test, and in connection with the application submitted his contract with plaintiff. Defendant received the test on Saturday May 6, 1950, and it was thereafter delivered to plaintiff. The test mentions the following matters specified specifications:

"2. The Designs shall, at the times and in the manner specified in the contract, fully comply with all the terms thereof, and if the Designs furnish in the performance of any tests or other agreed or required in this work, or in the contract, the tests shall thereupon be delivered at all liability terminated.

"3. If the Designs shall in any manner fail to meet the performance of the motor or other specified in the contract, or if the Designs shall change the work pursuant to the contract in the part of the Designs to do so, the Designs shall immediately so notify the Tucker at the home office in the City of Philadelphia, Pennsylvania. * * *.

" * * *

"4. If any changes or alterations by the Designs or Designs shall be made in the plans or specifications for the work described in the contract, the Designs shall immediately notify the Tucker thereof, giving a description and stating the amount or money required by such changes or alterations. * * *

" * * *

"5. This test date was ready to our owner inspection of the work specified in the contract; * * * the Designs assume by delay in supplying the work should such change or have actually been completed and proved, but in no event is reason of fire or the penal amount of this instrument.

"7. * * * not shall the Tucker be liable incurred unless the specifications made by the Designs to the Tucker for the performance of the contract shall be met.

"8. None of the conditions or provisions contained in this test shall be deemed waived or changed by the Tucker unless the written consent to such waiver or alteration be fully executed by its President or Vice-President and the seal be thereto affixed and duly attested; * * *.

"9. All notices and other evidence required by this test to be furnished by the Designs to the Tucker shall be in writing and shall be forwarded by registered mail to the Tucker at its principal office in Philadelphia, Pennsylvania."

Following the execution of plaintiff's contract with Tedman a second conference took place in the offices of the Berated Company, attended by Rosenthal, Tedman and one Kaubisch, who was secretary-treasurer and general credit manager of the Berated Company. Rosenthal desired the Berated Company to execute a contract for the manufacture of the freezers, but the company wished first to determine plaintiff's credit standing, which evidently proved unsatisfactory, because the contract was never executed and there appears to have been no further discussion of the matter with the Berated Company after May 20, 1930. Tedman evidently was aware of plaintiff's failure to reach an agreement with Berated Company, for on June 6, 1930, he wrote to Rosenthal as follows:

> "We have proceeded with your work about as far as we can go without seriously handicapping our procedure until you are settled with the manufacturer so that we can adjust our work to fit his conditions."

He also suggested a meeting in his shop at Galesburg between plaintiff's representatives, himself and one Gray, a prospective manufacturer for plaintiff's freezers. The meeting was arranged for June 12 and Rosenthal then expressed his desire that Gray Bros. manufacture the freezer in their factory at Plano, Illinois, and asked Gray to submit a price as the basis for further discussion. Tedman secured from Gray such data as would enable him to modify the drawings to meet the shop requirements of Gray Bros.' factory, and the required changes were thereafter made. For reasons not disclosed by the record plaintiff failed to contract with Gray Bros. and the negotiations were dropped.

In his efforts to secure someone to manufacture the freezers, Rosenthal requested Tedman, as late as July 22, 1930, to send drawings to the Clum Mfg. Co., in Milwaukee, and blueprints were also requested by him for submission to another, unidentified, manufacturer. Tedman sent the drawings to the Clum Mfg. Co., as Rosenthal had requested, but evidently no contract was ever made with that concern for the manu-

facture of plaintiff's product. There is some dispute in the evidence as to whether Rosenthal negotiated with Gray Bros., but he stated that "we were negotiating with a good many manufacturers already for getting a price for the manufacturing of that freezer. And Gray happened to be one of them."

Following the expiration of the sixty-day period within which Tedman had agreed that the dies would be made and delivered, plaintiff's attorney sent to Tedman a written notice, dated July 28, 1930, calling attention to his default, and thereafter, in October, 1930, suit against defendant followed.

Plaintiff's declaration alleged the execution of the bond; that defendant and Tedman had jointly obligated themselves to indemnify plaintiff to the extent of $5,000 against loss or damage caused by the failure of Tedman to faithfully perform the contract for the manufacture of dies in the event that the same should not be completed and delivered to plaintiff within sixty days from the date of the contract; that Tedman had not completed his work nor delivered the dies, as agreed, nor paid the $5,000 stipulated in the contract, and that defendant had likewise refused to pay the sum of $5,000 when requested, by reason whereof plaintiff was damaged to the extent of $5,000, for which suit was brought.

To the foregoing declaration defendant filed a plea of the general issue and several special pleas, setting forth the following defenses:

(1) That plaintiff did not perform its part of the contract, in that it failed to pay Tedman the sum of $5,000, as stated in the contract, but paid him only the sum of $1,000;

(2) That defendant would not have executed the bond except that it believed plaintiff had paid Tedman the entire sum of $5,000, as stated in the contract, and that plaintiff at all times knew that it had not paid the sum of $5,000 to Tedman, and

(3) That when the contract between plaintiff and Tedman was made plaintiff knew the same was impossible of performance, for that plaintiff had not paid Tedman the sum of $5,000 and knew that it was impossible for him to manufacture the tool equipment referred to

Tandem of plaintiff's product. There is some dispute in the evidence as to whether Magnetical manufactured with Troy Tower, but he stated that "we were requisitioning also a good many manufacturers already for getting a plant for the manufacturing of that Magnetical. We were supposed to be out of that."

Relying on the explanation of the disappointing profits which Tandem had agreed that the time would be much and delivered, Plaintiff's attorney sent to Tandem a written notice, dated July 24, 1966, calling attention to his contract, and demanding, in effect, that Tandem fulfill its obligations.

Tandem's doubtfulness clouded the sensitive of the Tandem that Tandem had partially fulfilled therefore in the amount plaintiff is the amount of $4,000 equipment lease or damage caused by the failure of Tandem to distribute getting the requisite for the installation of this in the event that the case should not be completed and delivered on plaintiff's state delay from the date of the contract; that Tandem had not completed his work nor delivered the line, in agreed, nor paid the $2,000 delinquent in the contract, and that defendant had illegally returned to you the sum of $2,000 when requested, by reason whereof plaintiff was damaged to the extent of $4,000, for which suit was brought.

In the foregoing testimony defendant filed a plea of the general issue not permit special plea, and set forth the following defense:

(1) That plaintiff did not perform its part of the contract, in that it failed to pay Tandem the sum of $4,000, as stated in the contract, but paid his only the sum of $1,000;

(2) That defendant would not have executed the contract if it believed plaintiff had paid Tandem the entire sum of $4,000, as claimed in the contract, and that plaintiff at all times knew that it had not paid the sum of $4,000 to Tandem, and

(3) That upon the contract between plaintiff and Tandem that such plaintiff knew the sum was impossible of performance, the that plaintiff had not paid Tandem the sum of $4,000 that was it was impossible for him to manufacture the 1967 vacuumatic recorder

in the contract so as to conform in every respect with the shop requirements of the Borated Mfg. Co.

As to the first of these defenses, it is urged that defendant was induced to execute the surety bond, which is the basis for the suit, by the false and fraudulent representations of plaintiff that the entire sum of $5,000 had been paid to Tedman as a consideration for the services to be rendered by him; that paragraph seven of the bond expressly provided that defendant should not be liable on the bond unless the consideration paid by the obligee (plaintiff) to the principal (Tedman) for the performance of the contract should be cash; that this representation was material, and furnished one of the principal inducements whereby defendant became surety for Tedman; that the misrepresentation was knowingly made, and because of these circumstances renders the bond invalid and discharges the defendant from its liability. Plaintiff's brief states but two propositions, and one of these is in reply to the foregoing contention of defendant. Plaintiff does not deny the legal aspect of this proposition, nor does it cite any authority contrary to the numerous decisions cited by defendant, holding in effect that misrepresentation of any material fact, when knowingly made, renders the bond invalid and discharges the surety from his liability.

Plaintiff takes the position in point 1 of its brief that "in the absence of proof to the contrary, the presumption is that the consideration mentioned in the contract was paid in cash." The record is not entirely clear as to the exact manner in which the consideration was paid. It shows, however, that Tedman received only $1,000 in cash. For some unexplained reason, which defendant characterizes as an intent on the part of plaintiff "to give color to the recited payment of the consideration and thus strengthen the paraphernalia of deception used in inducing the surety to execute the bond," Rosenthal gave Tedman, in addition to the $1,000 cash, notes aggregating $4,000 and also a check

in the contract can not be applied in order to compare with the amount
stipulated of the Acrylic Sdn. Bhd.

As is the first of such features, it is hoped that defendant
was instead to provide the money back, which is the basis for the
suit, by the false and fraudulent representations of plaintiff that
the entire sum of $2,000 had been paid to Tahsen as a consideration
for the services to be rendered by him; that paragraph seven of the
said expressly provided that defendant should not be liable on the
bond unless the consideration paid by the obligee (plaintiff) to the
principal [Tahsen] for the performance of the conditions should be proof
that this representation was material, and therefore was of the
principal importance; thereby defendant became merely the Tahsen, that
the misrepresentation was material made, not because of their circum-
stances relative the bond herein and therefore the defendant from its
liability. Plaintiff's brief states that the arguments, and one
of these is reply to the Tahsenian contention of defendant. Plain-
tiff does not deny the legal aspect of this proposition, nor does it
cite any authority contrary to the numerous decisions cited by defend-
ant, limiting in effect that misrepresentation of any material fact,
even knowingly made, renders the bond invalid and discharges the
surety from his liability.

Plaintiff takes the position in point 1 of its brief that
"in the absence of proof to the contrary, the presumption is that the
consideration mentioned in the contract was paid in cash." The issue
is not entirely clear as to the exact manner in which the consideration
was paid. It does, however, appear Tahsen received only $2,000 in cash.
For some unexplained reason, which defendant characterizes as an intent
on the part of plaintiff "to give color to the social payment of the
consideration and thus circumvent the jurisdiction of Zanzibar and
in leaving the jurisdiction to accept the case," Tahsenian gave Tahsen, in
addition to the $2,000 cash, notes aggregating $4,000 and also a check

for $4,000. Obviously this was a duplication of the purported payment of the difference between the cash received and the contract consideration of $5,000. Tedman needed working capital to complete his contract, and if he had been paid the $5,000 cash recited in the contract it would undoubtedly have minimized the risk which defendant assumed in its suretyship undertaking, and this, from the standpoint of defendant, was an important and very material factor. Tedman sought to discount the notes, but evidently plaintiff had no financial standing and the notes could not be discounted. Although there is no specific proof on the subject, the plain inference is that the check was never cashed, for on May 26, 1930, Rosenthal requested Tedman "to be so kind and send me our contract, which we gave to Mr. Sobberdiel for you to sign, together with my personal check." The contract was returned to Rosenthal, but the record does not disclose whether or not the check was also returned. The contract between plaintiff and Tedman was signed about May 15th, at which time the $1,000 cash, notes and check consideration passed to Tedman, and since Rosenthal requested the return of the check as late as May 26th, it is evident that it had not been cashed up to that time. Nor is there any evidence in the record that it ever was cashed. Moreover, it was shown by defendant that as late as July 2, 1930, Rosenthal sought to secure a loan for Tedman from some third person as necessary capital for completing his contract, which lends additional force to the contention that Tedman received only $1,000 in actual cash when the agreement was executed. The sum and substance of the matter is that the failure or inadvertence of defendant to prove specifically that the notes were never paid or the check cashed, is seized upon by plaintiff to obviate the force of the authorities. The only conclusion that can be fairly drawn from the circumstances of the case is that Tedman received only $1,000, and therefore the representation con-

tained in the contract was untrue. The legal effect of such misrepresentation is discussed in the numerous decisions cited by defendant. Equitable Surety Co. v. Board of Commissioners, 231 Fed. 33, was a suit against a contractor and his surety on a bond given to secure performance on a contract to dig a canal. The agreement stated that the consideration to be paid to the contractor was $19,500. The agreed consideration was in fact only $18,000. The court characterized the difference as a serious misrepresentation, and said: (p. 40)

"Coming to the request with reference to what is claimed to be a misrepresentation as to the contract price, we deem this one of the most material matters as to which a request was made. To represent to the surety company that they were to receive $19,500, when, as a matter of fact, they were to receive only $18,000, if the representation was made at the instance or with the knowledge of the drainage commissioners, would certainly be such a serious misrepresentation as would have authorized the court to submit to the jury the question as to whether that increased the hazard and risk of the surety company to the extent that it relieved it from liability on the bond. * * * We think the surety company was clearly entitled to the charge requested on this subject."

In Pittsburgh Plate Glass Co. v. Fidelity & Deposit Co., 193 N. C. 709, the surety on a contractor's bond was relieved of liability because the principal and named obligee represented to the surety that the principal was to receive $418,896 in cash for building a hotel, whereas the parties had actually agreed that part of the consideration should be paid in bonds and the actual consideration moving to the contractor was further diminished by his secret promise to pay out certain funds to various third persons. That case resulted in a reversal of a judgment against the surety and a new trial for defendant on the issue as to whether or not in compromising certain matters with the obligee under the bond defendant had waived the alleged fraud.

In Atlantic Trust & Deposit Co. v. Union Trust & Title Corp. et al., 110 Va. 386, the court had under consideration the question of a surety's liability on a contract of suretyship entered into upon the mistaken assumption that the written agreement of the principal and

taken in the execution of a surety. The Court stated at such date representations is discussed in the [illegible] decision right by defendant. Qualified Surety Co. v. Court of Industrial Rel. 28 Pac. 22, was a suit against a contractor and his sureties on a bond given by surety protecting as a condition of the bond. The agreement stated that the consideration is to be paid to the contractor [illegible]. The agreed consideration was in fact only [illegible]. The court characterized the difference as a matter [illegible] and said: (p. 22)

"Taken in the general sense reference to what is claimed to be a misrepresentation is of the material price, or some item of the most material matters to be which a prudent man ought, in the exercise of the ordinary caution, that they are to receive will [illegible], or the representation was made at least, that are to receive will [illegible], or the representation was made at least, that the [illegible] of the [illegible] material, usually - especially in such - [illegible] representation, or could have reasonably the court be [illegible] that the [illegible] of the surety company in the [illegible] is [illegible] in the [illegible] of the [illegible]. [illegible] the surety company [illegible] in the [illegible] to the [illegible] material to the [illegible]."

In Fidelity Casualty Co. v. Indust. Acc. Com. 188 P. 2d 348, the surety on a [illegible] bond was released of liability because the principal and owner [illegible] representations in the surety that the principal was to receive $[illegible] in work for building a [illegible]. Whereas the petition had actually agreed that part of the consideration should be paid in bonds and the actual consideration [illegible] in the contract was further disclosed by the agent's [illegible] to [illegible] funds to various third persons. This case resulted in a recovery of a judgment against the surety and a new trial for determination on the issue as to whether or not in [illegible] certain matters [illegible] the bond defendant had waived the alleged fraud.

In Illinois Fuel & Supply Co. v. Union Trust & Title Co. et al., 110 Va. 386, the court had under consideration the question of a surety's liability on a contract of suretyship entered into upon the mistaken assumption that the written agreement of the principal and

creditor expressed their true agreement, and it was held that the deception was a bar to the action. The court declared it to be a well settled proposition that "where, with the knowledge or assent of the creditor, there is a misrepresentation to the surety with regard to any material fact, which, if he had known, he might not have entered into the undertaking of suretyship, it will thereby be rendered invalid and the surety discharged from his liabilities."

The Supreme court of this state had the subject under consideration in Booth v. Storrs, 75 Ill. 438, wherein they cited various cases and then quoted from Jackson v. Ducharrie, 3 T. R. 551, as follows:

"Now the principle to be drawn from the cases to which reference has been made in the course of the argument is this, that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety so given is void at law, on the ground of fraud."

The second and only other ground urged for reversal is that defendant failed to assume the burden of showing that a change was made in the plans and specifications for manufacturing plaintiff's freezer. It is conceded that efforts were made to secure some one other than Berated Company to manufacture the freezers in question with dies to be made by Tedman, but plaintiff states that it does not appear that it ever directed Tedman not to make the dies in question to conform with the shop requirements of the Berated Company, and that for the purposes of complying with the contract all that Tedman had to do was to make up the dies according to the original specifications and tender the same to plaintiff. This contention is contrary to the logic of the situation, as disclosed by the evidence, for it is apparent that Tedman could not prepare the dies until he knew who the manufacturer of the freezer was to be and until he had

whether expressed tacit or expressly, and if so that that the description was a bar to the action. The court decided it to be a well settled proposition that "where, with the knowledge or consent of the creditor, there is a misrepresentation in the security with regard to any material fact, which, if he had known, he might not have assented into the undertaking of suretyship, it will thereby be treated herein the suretyship discharged from his liability."

The German court of this state had the subject under consideration in Smith v. Jones, 77 ill. 494, wherein they cited various cases and text cited from Dunham v. Bonhamite, 2 Tr. 3r. 391, as follows:

"The principle to be gathered from these cases may be stated relations has been made in the nature of the agreement in fact, that if, with the knowledge or consent of the creditor, any material part of the transaction between the principal and the creditor is misrepresented to the surety, the misrepresentation being such that the surety was induced thereby to enter into the engagement, the agreement may be avoided at the surety's option. Where the misrepresentation was made by the principal alone in (ill, 4), being material fact, the effect of the surety's liability which the surety incurred, the surety is given a valid ground of defense.

The second and only other ground urged for reversal is that defendant failed to assume the burden of showing that a change was made in the plans and specifications for manufacturing plaintiff's Tresser. It is conceded that efforts were made to secure some one else, then Dunham Company to manufacture the Tresser in question with plans to be made by Tolman. The plaintiff admits that it does not appear that it ever directed Dunham not to make the Tresser in question in conform with the shop requirements of the Sunset Company, and that for the purpose of complying with the contract all that Dunham had to do was to make up the Tresser according to the original specifications and render the same to plaintiff. This conversation in question in the light of the circumstances, as disclosed by the evidence, for it is apparent that Tolman could not perform the Tresser until he knew the manufacturer of the Tresser was to be and which he had

received from that manufacturer information as to the shop requirements necessary to make the dies fit the manufacturer's presses. It would have been folly for Tedman to make the dies fit the shop requirements of the Berated Company, since he was fully aware that the Berated Company had not contracted with plaintiff to carry on the manufacture of the freezers and that negotiations were subsequently carried on with Gray Bros., Clum Mfg. Company, and another unknown manufacturer to make plaintiff's product. Until Tedman knew who the manufacturer would be and was apprised of its shop requirements he could not very well have proceeded with the completion of his die contract. Defendant assumed and carried the burden of showing these circumstances by competent and convincing evidence.

Defendant presents various other grounds to sustain the judgment, including the failure of plaintiff to prove substantial damages. However, since plaintiff relies solely upon the two points hereinabove stated we consider it unnecessary to discuss these additional points.

Plaintiff failed to file a complete abstract of the record, as required by rule 6 of the appellate court. The matters presented in the supplemental abstract were necessary for a full consideration of the case, and therefore the costs of the supplemental abstract will be taxed against plaintiff.

For the reasons stated the judgment of the circuit court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

results from this manufacturer's failure to do the duty incumbent upon it to make the site for manufacture's premises. It would have been fully for Jackson to make the site fit the duty requirements of the Bowdoi Company, since he was fully aware that the Bowdoi Company had not contracted with plaintiff to carry on the manufacture of the fixtures and that negotiations were advantageously pointed to with Grey Grey, Company, and another unknown manufacturer to make plaintiff's plates. Until Jackson knew who the manufacturer would be and approached of its duty requirements he would not very well have proceeded with the completion of his die contract. Defendant cannot and avoid the duties of locating these circumstances by employment and exercises rights.

Jackson practically assumed other powers to assume the judgment. Including the failure of plaintiff to prove substantial damages. However, since plaintiff acting solely upon the jus points mentioned above sought to consult it advantageously to discuss these additional points.

Plaintiff failed to file a complete contract of the record, as required by rule 6 of the appellate court. The matters presented in the supplemental abstract were necessary for a full consideration of the case, and therefore the costs of the supplemental abstract will be taxed against plaintiff.

For the reasons stated the judgment of the circuit court is affirmed.

AFFIRMED.

Mosman, P.J., and Dailey, J., concur.

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38113

AMERICAN MOTORISTS INSURANCE COMPANY, a corporation,
Appellant,

v.

INTER-INSURANCE EXCHANGE OF THE ILLINOIS AUTOMOBILE CLUB, DAVID ROSENBACH, personally and as attorney in fact for the Inter-Insurance Exchange of the Illinois Automobile Club, HERMAN ABEL et al.,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

283 I.A. 634

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

March 16, 1933, the American Motorists Insurance Company brought an action at law against the Inter-Insurance Exchange of The Illinois Automobile Club (hereinafter referred to as the Exchange), David Rosenbach, personally and as attorney in fact of the Exchange, and some 2800 of its individual members, who are called "subscribers." Summons was issued directing the sheriff of Sangamon county to serve the Exchange and David Rosenbach, personally and as attorney in fact for the exchange. The sheriff made the following return to the summons:

"I have duly served the within summons on the within named Inter-Insurance Exchange of the Illinois Automobile Club by reading the within to Ernest Palmer, Acting Director of the Department of Trade and Commerce of the State of Illinois, appointed and acting attorney in this state upon whom all lawful process against the said Inter-Insurance Exchange of the Illinois Automobile Club can be served, and at the same time delivering to said Ernest Palmer a true copy thereof this 13th day of April, A. D. 1933. I cannot find in my county David Rosenbach this 13th day of April, A. D. 1933."

Also, on March 16, 1933, plaintiff filed its declaration charging trespass on the case on promises against the Exchange, David Rosenbach, personally and as attorney in fact for the Exchange, and the 2,800 persons, firms and corporations whose names appear

in a schedule of defendants contained in the declaration and designated as subscribers of the Exchange. Neither the Exchange, David Rosenbach, nor any of the 2,800 persons whose names appear in the declaration, filed an appearance or plea in the proceeding, and judgment by default for $1,911.27 was taken by plaintiff April 26, 1934, against all the 2,800 persons mentioned in the declaration. The Exchange and Rosenbach, as attorney in fact, were not included in the judgment order.

August 23, 1934, eleven of the individuals against whom judgment was had appeared specially for the purpose of questioning the court's jurisdiction, and moved to vacate the judgment on the ground that no suit was ever commenced against the 2,800 persons named, no summons issued, no service had upon them, that they were not parties to the suit and the inclusion of their names in the judgment was not authorized, and that the judgment was accordingly void for want of jurisdiction. The court allowed the motion, vacated the judgment and quashed the execution therstofore issued. This appeal followed.

The sole question involved is whether the court acquired jurisdiction of the individual defendants by service of summons upon the Director of Trade and Commerce in accordance with the statutory provisions regulating the business of reciprocal or inter-insurance. The inter-insurance or reciprocal plan contemplates the association of persons, called "subscribers," for the purpose of exchanging among themselves policies of insurance through the agency of an attorney in fact. The organization is not a corporation, but is known in law as a voluntary association. The entire management of the business and the responsibility for its conduct is vested in the attorney in fact, and the only participation in the business by the policy holders consists in the exchange of insurance policies

in a schedule of terminals revealed in the indictment and designated as subscribers of the business. Either the defendants, David Tarnkovsky, nor any of the 4,000 persons whose names appear in the indictment, filed an appearance or plea in the proceeding, and judgment by default for $4,411.47 was taken by plaintiff - April 24, 1934, against all the 3,000 persons mentioned in the indictment. The defendants and Tarnkovsky, as attorney in fact, were not included in the judgment order.

March 22, 1934, eleven of the individuals mentioned above judgment was not opposed specially for the purpose of questioning the court's jurisdiction, and moved to vacate the judgment on the ground that he will not was not summoned against the 4,000 persons named, on account inasmuch, by service not upon them, that they have not parties to the suit and the knowledge of their names in the judgment was not authorized, and that the judgment was accordingly void for want of jurisdiction. The court allowed the motion, vacated the judgment and granted the accepting Secretary's request. This appeal follows.

The sole question involved is whether the court acquired jurisdiction of the individual defendants by service of summons upon the Director of Taxis and Conveyances in accordance with the statutory provisions regulating the business of recipients or inter-insurance. The inter-insurance or reciprocal plan contemplates the association of persons, called "subscribers", for the purpose of exchanging among themselves policies of insurance through the agency of an attorney in fact. The organization is not a corporation, but is known in law as a voluntary association. The entire management of the business and the responsibility for its conduct is vested in the attorney in fact, and the only participation in the business by the policy holders consists in the exchange of insurance policies

with their associates and the payment of the stipulated premiums.

The agreement and power of attorney executed by the defendants authorizing the attorney in fact to exchange policies of insurance and to reinsure the risks as specified, also contains the following provision:

"My said attorney in fact is hereby expressly empowered to adjust and settle all losses and claims made under insurance policies and agreements exchanging indemnity, to accept service and enter my appearance in actions, suits and other proceedings at law or in equity, and to institute such proceedings, or any of them, and to prosecute, defend, compromise and adjust the same, etc. * * *

"My said attorney is hereby expressly empowered to appoint and authorize the Director of Trade and Commerce of the State of Illinois to accept service of process in any action, suit or proceeding against me at law or in equity arising or growing out of my subscription at such Inter-Insurance Exchange of the Illinois Automobile Club."

Cahill's Illinois Revised Statutes, 1933, chap. 73, par. 41, et seq., which regulates reciprocal or inter-insurance, provides in effect that contracts of insurance may be executed by an attorney in fact duly authorized and acting for the subscribers, and that the office of the attorney in fact may be maintained at such place or places as may be designated by the subscribers in the power of attorney; that the attorney in fact shall file with the Director of Trade and Commerce a declaration specifying the name of the attorney in fact, the name or designation under which the contracts are to be sued, a copy of the form of power of attorney or other authority of the attorney in fact under which the insurance is effected or exchanged and a form of the entire contract between the attorney in fact and subscriber.

The act provides that when the attorney in fact presents to the Director of Trade and Commerce evidence sufficient to satisfy him that he has complied with the provisions of the Act, and has filed with the director an appointment designating the Director of Trade and Commerce as agent to accept and acknowledge service of process for the subscribers, then the director may issue to the attorney in fact a license authorizing him in the name of the subscribers to issue policies.

with their associates and the payment of the anticipated premiums.

The agreement and power of attorney executed by the defendants authorizing the attorney in fact to encourage policies of insurance and to validate the claims as specified, also contains the following provision:

"If said attorney in fact is hereby expressly empowered to adjust and settle all losses and claims made under insurance policies and agreements authorizing insurance, to assign service and render appearance in actions, suits and other proceedings at law or in equity, and to institute such proceedings, at his or their, and to prosecute, defend, compromise and adjust the same, etc. * * *

"If said attorney in fact expressly empowered to appoint and maintain the Director of Trade and Commerce of the State of Illinois to accept service of process in any action, suit or proceeding against us in an equity action or proceeding and at any subpoena or make interrogatories directed to the Illinois Insurance Code."

Smith's Illinois Revised Statutes, 1953, chap. 73, par. 6, 6a par., which regulates reciprocal or inter-insurance, provides in effect that contracts of insurance may be executed by an attorney in fact duly authorized and acting for the subscribers, and that the office of the attorney in fact may be maintained at such place or places as may be designated by the subscribers in the power of attorney; that the attorney in fact shall file with the Director of Trade and Commerce a declaration specifying the name of the attorney in fact, the name or designation under which the contracts are to be made, a copy of the form of power of attorney or other authority of the attorney in fact under which the insurance is effected or exchanged and a form of the entire contract between the attorney in fact and subscribers.

The act provides that when the attorney in fact presents to the Director of Trade and Commerce evidence sufficient to satisfy him that he has complied with the provisions of the act, and has filed with the director an appointment designating the Director of Trade and Commerce as agent to accept and acknowledge service of process for the subscribers, then the director may issue to the attorney in fact a license authorizing him in the name of the subscribers to issue policies.

Par. 54 (sec. 14) of the act provides that any action may be brought against all subscribers in the county in which the cause of action arises or where claimant resides, that service shall be had upon the attorney in fact or the Director of Trade and Commerce, and that "service of process procured against any subscriber in any other manner shall not be legal."

Par. 55 (sec. 15) of the act provides that when summons is served upon the Director of Trade and Commerce, as agent for the subscribers, he shall immediately notify the attorney in fact, but no provision is made for notifying the subscribers themselves of the commencement of the suit.

It thus appears from the provisions of the statute and the express agreement of the subscribers that the common law rules relating to the service of process have no application to this proceeding. Under the power of attorney hereinbefore set forth each individual subscriber has expressly authorized the attorney in fact to accept service of process and enter the subscriber's appearance in actions, suits and other proceedings at law or in equity, and by the same power of attorney each subscriber has expressly empowered the attorney in fact to appoint and authorize the Director of Trade and Commerce of this state to accept service of process in any action, suit or proceeding against him, at law or in equity, arising or accruing out of his subscription to the Inter-Insurance Exchange. In this case the Director of Trade and Commerce was served with summons, and accepted such service. Under the statute he is required immediately to notify the attorney in fact of the subscribers, but there is no provision in the statute that the attorney in fact must notify the subscriber, because each subscriber has agreed that his attorney in fact shall have the sole and exclusive right to defend for him in any suit. In other words, each individual subscriber of the Exchange has appointed two agents and delegated to them the complete and exclusive

Sec. 32 (sec. 14) of the act provides that any action may be brought against an subscriber in the county in which the cause of action arose or that claimant resides, that service shall be had upon the attorney in fact or the Director of Trade and Commerce, and that "service of process prescribed against any subscriber in any other manner shall not be legal."

Sec. 33 (sec. 15) of the act provides that when summons is served upon the Director of Trade and Commerce, as agent for the subscriber, he shall immediately be attorney in fact, but no provision is made for notifying the subscriber themselves of the commencement of the suit.

It thus appears from the provisions of the statute and the express agreement of the subscribers that the common law rules relating to the service of process have no application to this proceeding. Under the power of attorney incorporated set forth each individual subscriber has expressly authorized the attorney in fact to accept service of process and enter the subscriber's appearance in actions, suits and other proceedings at law or in equity, and by the same power of attorney each subscriber has expressly empowered the attorney in fact to appoint and authorize the Director of Trade and Commerce of this state to accept service of process in any action, suit or proceeding against him, at law or in equity, arising as accruing out of his subscription to the Inter-Insurance Exchange. In this case the Director of Trade and Commerce was served with summons, and accepted such service. Under the statute he is required immediately to notify the attorney in fact of the subscriber, but there is no provision in the statute that the attorney in fact must notify the subscriber, because such subscriber has agreed that his attorney in fact shall have the sole and exclusive right to defend for him in any suit. In other words, each individual subscriber of the Exchange has appointed two agents and delegated to them the complete and exclusive

authority to accept service of process and to defend any suit which might be brought against him: one, his attorney in fact, and the other the Director of Trade and Commerce. Under the plain language of the agreement of the subscribers, taken in connection with the provisions of the statute, the subscriber has nothing to do with the service of process or with the defense of the suit. He has waived these rights by becoming a member of the Exchange and by subscribing to the agreement vesting his attorney in fact and the Director of Trade and Commerce to represent him. It follows that the individual subscribers may be sued by instituting suit against the Exchange; that summons in such suit may be served upon the Director of Trade and Commerce and under the statute cannot be served on the individual subscribers; and that the suit, having been properly brought against the individual subscribers, and service of summons had in accordance with their agreement and the provisions of the statute, the court acquired jurisdiction over them.

The declaration sets forth the organization of the exchange, and it contains a schedule bearing the names of the subscribers of the Exchange at the time the obligation sued on accrued. Presumably sufficient proof was made as to the subscribers whose names are listed in the declaration to sustain the judgment. When defendants appeared specially and moved to vacate the judgment they relied solely upon the lack of the court's jurisdiction to enter a judgment against them upon the service had, and no representations were made upon the hearing of the motion, either by way of affidavit or otherwise, that the moving defendants or any of the other defendants were not subscribers to the Exchange. Defendants argue that if this procedure is to be sanctioned, a creditor may declare any number of individuals as subscribers to an inter-insurance exchange, and without service of process or notice, procure judgment against them; that some of those named may not be subscribers and may never have authorized the attorney in fact or

authority to compel payment of a debt and is dated and until that time be treated as an open, its authority is final, and the state the interest of force and fraudulent. Under the plain language of the agreement of the subscribers, taken in connection with the provisions of the statute, the subscriber has neither to do with the manner of process or with the release of the suit. He has waived these rights by designating a number of the Commonwealth and by subscribing as the agreement working his abstract in fact and the decision of fact and therefore is erroneous. It follows that the individual subscribers may be sued by instituting suit against the Commonwealth that summons in such suit may be served upon the Minister of Trade and Commerce and under the statute cannot be served on the individual subscribers; and that the suit, having been properly brought against the individual subscribers, and service of summons had in accordance with their agreement and the provisions of the statute, the court acquired jurisdiction over them.

The difficulties will lack the appellants at the hearing, and it contains a substitute setting the names of the subscribers of the subpoena at the time the original was served on service. Previously sufficient proof was made as to the subscribers whose names are listed in the declaration to sustain the judgment. Then defendants appealed specially and moved to vacate the judgment they relied solely upon the lack of the court's jurisdiction in order a judgment against them upon the service had, and no representations were made upon the hearing of the motion, either by way of affidavit or otherwise, that the moving defendants or any of the other defendants were not subscribers to the Subpoena. Defendants argue that if this proceeding is to be maintained, a minister may direct any member of individuals to subscribe to an inter-issues subpoena, and either further of proceed at notice, private judgment against them; that some of those named may not be subscribers and may never have authorized the attorney in fact or

the Director of Trade and Commerce to accept service for them, and in that situation they would be deprived of an opportunity of appearing in court and proving that they had not subscribed to the exchange agreement and had not authorized the acceptance of service for them. We think it is a sufficient answer to this contention to say that none of these defendants is in that position, because no such contention was made in the trial court when their motion to vacate was presented. They relied solely on the jurisdictional question. If they had by affidavit or other proper showing presented to the court evidence tending to prove that they were not subscribers, or that they had never authorized the attorney in fact or the Director of Trade and Commerce to accept service for them, a different question might be presented.

Counsel on both sides cite authorities, not only in Illinois but in Arkansas, Michigan, Texas and Washington, where similar inter-insurance statutes exist. It has been held in this state that where the membership agreement of a voluntary inter-insurance association provides for service of summons on the manager, he thereby becomes the agent of all the subscribers and a policy-holder may maintain an action at law on the policy against him and need not sue the individual subscribers for their pro rata share of the loss. (Warfield-Pratt-Howell Co. v. Williamson, 233 Ill. 487.) Also that suit was properly brought and judgment rendered against the attorney in fact of an incorporated association upon the theory that he was acting as the agent of an undisclosed principal. (Grossman v. Nichols, 283 Ill. App. 297.)

In Lewelling v. M. W. W. Underwriters, 140 Ark. 124, the question arose as to whether a subscriber may sue the association in its associated name. The court held that while the act does not in express terms so provide, the plain implication of the statute permits such suit. In discussing this particular phase of the question, the court said: (p. 129):

of Trade

the Directors' [illegible] memorandum is weight worth. Yet [illegible], and as that attention they would be guilty of an opportunity of objecting in court and proving that they had not abandoned in the [illegible] agreement and had not authorised the conditions of trade [illegible]. We think it is a matter[illegible] of this construction is [illegible] that some of these [illegible] in that position, [illegible] such [illegible] was made in the trial court. [illegible] They [illegible] on the jurisdictional question. If they had by affidavit or other proper showing presented to the court [illegible] in proof that they were not [illegible], or that they had never authorised the attorney in fact or the officer of Trade [illegible] to assert [illegible], a different question might be presented.

Counsel on both sides argument, not only in [illegible] but in [illegible], [illegible] and [illegible], where similar insurance existed exist. It has been held in this state that where the [illegible] of a voluntary inter-insurance association [illegible] for service of summons on the manager, [illegible] the [illegible] of all the subscribers and a policy-holder may maintain an [illegible] on the policy against him and does not use the individual subscribers for their [illegible] share of the loss. (Mutual-Trust-Benefit [illegible] v. [illegible], 221 Ill. 487.) [illegible] that suit was properly brought and judgment rendered against the attorney in fact of an incorporated association upon the theory that he was acting as the agent of an unincorporated [illegible]. (Gardner v. [illegible], [illegible] Ill. [illegible], 387.)

In [illegible] v. [illegible], [illegible] Ill. [illegible], the [illegible] stood as to whether a subscriber may use the association in the [illegible] and same. The court held that while the act does not in express terms [illegible], the plain implication of the whole [illegible] such suit. In discussing this particular phase of the question, the court said: (p. 124):

"It is true the act does not, in express terms, provide that suit shall be brought against the association under its associated name, but such is, we think, the effect of the statute when all its parts are read in the light of each other. It would be a vain and idle thing to provide that service of process should be had upon the Insurance Commissioner in all suits in this State arising out of such policies and contracts, and that such service should be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through the attorney in fact if the plaintiffs had to resort to the common law method of procedure as to the parties to the suit. In other words, it would be useless to provide that suits should be brought against each subscriber in his individual name and that service might be had upon the Insurance Commissioner."

In Sergeant v. Goldsmith Dry Goods Co., 110 Tex. 482, it was held, relative to the obligations of third persons, that the members of the association were jointly and severally liable, each in his application having given express authorization therefor. Michigan and Washington cases cited by counsels' briefs are generally to the same effect. None of these cases is controlling, however, upon the question here under discussion.

Upon oral argument defendants' counsel took the position that the individual members should have been included in the summons. If this had been done it would not in anywise have changed the proceedings followed by plaintiff. Since the statute provides that service of process procured against any subscriber in any manner other than through service upon the attorney in fact or the Director of Trade and Commerce is not legal, we see no necessity for having the names of the 2,800 subscribers in the summons. Defendants admit that it was not necessary to serve them personally, and therefore there would have been no purpose in including their names in the summons.

It is also argued that judgment should have been taken against the Exchange, as the representative of the subscribers, and that if the Exchange could not respond financially to the judgment, plaintiff, who is a creditor of the Exchange, could have proceeded by way of a creditors' bill or supplemental proceedings to subject the

"It is true, as we have noted above, in express terms, provide that suit shall be brought against the association which its members have, but such is in fact, the effect of the statute when all its parts are read in the light of each other. It would be a vain and idle thing to provide that service of process should be had upon the insurance commissioner in all suits in this state relating one of such building and association, and then make it effectual as to all the parts of the association particular through the agency in fact it has plaintiffs but to resort to the general authority of process be be the purpose of the suit. In other words, it would be unusual in people that suits should be brought against such association in this jurisdiction and that service might be had upon the Insurance Commissioner."

In Insurance v. Building Ass'n Co., 110 Tex. 488, it was held, relative to the obligations of third persons, that the members of the association were jointly and severally liable, such in the application having given express indemnification thereby. Michigan and Washington cases cited by counsel, briefly are generally to the same effect. None of them cases is controlling, however, upon the question here more directly.

Upon oral argument defendants' counsel took the position that the individual members should have been included in the summons. If this had been done it would not in anyone have changed the proceedings followed by plaintiff. Since the statute provides that service of process personal against any association in any manner other than through service upon the secretary in fact or the director of Taxes and Insurance is not legal, we see no necessity for having the names of the 8,000 subscribers in the summons. Defendants admit that it was not necessary to serve them personally, and therefore there would have been no purpose in including their names in the summons.

It is also argued that judgment should have been taken against the Exchange, as the representative of the subscribers, and that if the Exchange could not respond financially to the judgment, plaintiff, who is a creditor of the Exchange, could have proceeded by way of a creditors' bill or supplemental proceedings to subject the

assets of the Exchange to the satisfaction of the judgment. There is nothing in the statute which contemplates so cumbersome a proceeding, and we are not disposed to so construe the statute as to require plaintiff, who has a valid claim against the Exchange, to resort to two suits and protracted litigation for the purpose of effecting a recovery and collecting that which is justly due it.

For the reasons stated the order of the circuit court vacating the judgment against the defendants as subscribers to the Exchange will be reversed, and it is so ordered.

REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

36 H

38114

LUMBERMEN'S MUTUAL CASUALTY COMPANY, a corporation, and CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, a corporation, associated as Illinois Motorists Alliance,
Appellants,

v.

INTER-INSURANCE EXCHANGE OF THE ILLINOIS AUTOMOBILE CLUB, DAVID ROSENBACH, personally and as attorney in fact for the Inter-Insurance exchange of the Illinois Automobile Club, HERMAN ABEL et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

283 I.A. 635

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause was consolidated on appeal with case No. 38113, American Motorists Insurance Company, a corporation, versus Inter-Insurance Exchange of the Illinois Automobile Club et al. The facts and issues raised in this cause are precisely the same as those in case No. 38113, and therefore the opinion in that proceeding is controlling.

For the reasons there stated, the order of the circuit court vacating the judgment against the defendants as subscribers to the Exchange in the instant proceeding will be reversed, and it is so ordered.

REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

[illegible]

[illegible]

[illegible]

37 4

38152

LLOYD L. HUGHES, Appellee, v. A. F. DENEMARK, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

283 I.A. 635[2]

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an action in trespass on the case on promises, claiming damages for breach of a written contract by defendant. The cause was tried by the court without a jury, resulting in a judgment for $1,800 in favor of plaintiff, from which defendant appeals.

The essential and undisputed facts disclose that defendant contracted to purchase from plaintiff 60,000 lbs. of the 1930 crop of hops to be grown in Moxee Valley, Washington, during the year 1930. For these hops defendant agreed to pay 19 cents a pound, f.o.b. Moxee city, Washington. $1.00 was paid at the time of the signing of the contract, and defendant agreed to pay the further sum of $1,800 March 1, 1930, $900 September 1, 1930, and the balance on arrival of draft attached to bill of lading. Advances were to be deducted pro rata as deliveries were made. The deliveries were scheduled as follows:

20,000 lbs. - October 1st to October 31st, 1930
20,000 lbs. - November 1st to November 30th, 1930
20,000 lbs. - December 1st to December 30th, 1930.

Defendant failed to pay the $1,800 due March 1, 1930, and the $900 due September 1, 1930, although numerous demands were made upon him by plaintiff. Accordingly, it became necessary for plaintiff to

[illegible]

[illegible] I. [illegible],

Appellee,

v.

A. F. [illegible],

Appellant.

A[illegible] [illegible] CIRCUIT COURT,

[illegible] COUNTY.

[illegible]

[illegible] JUDGES [illegible] OPINION OF THE COURT.

Plaintiff filed an action in trespass on the case on promissory [illegible] for breach of a written contract by defendant. The cause was tried by the court without a jury, resulting in a judgment for $2,000 in favor of plaintiff, from which defendant appeals.

The essential and undisputed facts disclose that defendant contracted to purchase from plaintiff 60,000 lbs. of the 1930 crop of hops in the green in Hop Yard, Washington, during the year 1930. For these hops defendant agreed to pay 1½ cents a pound, f.o.b. Hop City, Washington. $1.00 was paid at the time of the signing of the contract, and defendant agreed to pay the balance sum of $1,800 March 1, 1930, $900 September 1, 1930, and the balance on arrival of draft attached to bill of lading. Advances were to be deducted pro rata as deliveries were made. The deliveries were scheduled as follows:

60,000 lbs. - October 1st to October 31st, 1930
20,000 lbs. - November 1st to November 30th, 1930
20,000 lbs. - December 1st to December 30th, 1930.

Defendant failed to pay the $1,800 due March 1, 1930, and the $900 due September 1, 1930, although numerous demands were made upon him by plaintiff. Accordingly, it became necessary for plaintiff to

advance money to the growers with whom he had contracted for these hops. Contracts for the sale of hop crops to be grown in the future by custom provided for the payment of substantial advances to the growers of the purchase price of the hops in March of each year, for the purpose of assisting in the payment of labor and material required to plant and cultivate the crop in the spring and fall. Additional advances upon the purchase price are usually made by September 1st to facilitate the financing and harvesting of the crop. The harvesting expenses, according to the evidence, consisted of picking, drying, pruning material, fuel for drying, sewing twine, burlap, wood and labor in and about the hop house. Plaintiff contracted with the five following growers to fill the contract which he had made with defendant, all of whom knew that their crops were to be grown to fulfill the agreement made between plaintiff and defendant:

William Gamachie - 10,000 lbs. at 18¢ per pound
Walter Desallier - 10,000 lbs. at 18¢ per pound
C. P. Meyer - 6,000 lbs. at 18¢ per pound
A.E.Beauleaurier - 20,000 lbs. at 18¢ per pound
Charles Andersen - 20,000 lbs. at 18¢ per pound.

The hops thus contracted for with the growers were of the same quality as specified in defendant's contract. Upon defendant's failure to advance the sums stipulated in the agreement, plaintiff was obliged to advance to the growers $3,300 to finance the picking of the crops. To secure the necessary sum he executed a chattel mortgage on each and every one of the crops, with the Moxee City Bank. In order to secure the loan it was necessary that the crops be free of any incumbrances which might interfere with the bank's right to sell in case of its decision to call the loan, and accordingly plaintiff declared defendant's interest in the contract at an end because of his failure to perform. Defendant offered no excuse for his failure to pay, except that he lacked the necessary funds.

After termination of the contract and the necessary advances

advance money to the grower with which to buy materials for these hops. Contracts for the sale of hop crops to be grown in the future by growers provided for the payment of monetary advances to the growers of the plaintiff's hops at the hops in March of each year, for the purpose of assisting in the payment of labor and materials required to plant and cultivate the crop in the spring and fall. Additional advances upon the produce yield are usually made by defendant but in furnishing the financing and interesting of the crop. The harvesting expenses, according to the evidence, consisted of picking, drying, drying material, fuel for drying, baling twine, baling, wood and labor in and about the hop house. Plaintiff contracted with the five following growers to fill the contract which he had made with defendant, all of whom knew that their crops were to be grown to fulfill the agreement made between plaintiff and defendant:

William Doughty - 12,000 lbs. at 12¢ per pound
Walter Doughty - 10,000 lbs. at 12¢ per pound
C. F. Boyer - 8,000 lbs. at 12¢ per pound
W.J. Bonnewitz - 20,000 lbs. at 12¢ per pound
Charles Andrews - 20,000 lbs. at 12¢ per pound.

The hops thus contracted for with the growers were of the same quality as specified in defendant's contract. Upon defendant's failure to advance the sums stipulated in the agreement, plaintiff was obliged to advance to the growers $2,500 to finance the picking of the crops. To secure the necessary sum he executed a chattel mortgage on each and every one of the crops, with the Home City Bank. In order to assure the bank it was necessary that the crops be free of any encumbrances which might interfere with the bank's right to sell in case of its decision to sell the loan, and accordingly plaintiff declared defendant's interest in the contract at an end because of his failure to perform. Defendant offered no excuse for his failure to pay, except that he lacked the necessary funds.

After consultation of the creditors and the necessary advances

made to the growers, plaintiff accepted delivery of the hops from the growers during the month of October, 1930, and paid each of them respectively the following sums:

William Gamachie	- $1800, at 18¢ per lb.,	for 10,000 lbs.
A. M. Beauleaurier	- 2700, at 18¢ per lb.,	for 15,000 lbs.
C. P. Meyer	- 1080, at 18¢ per lb.,	for 6,000 lbs.
Charles Anderson	- 3600, at 18¢ per lb.,	for 20,000 lbs.
Walter Desallier	- 1800, at 18¢ per lb.,	for 10,000 lbs.

Thereafter plaintiff placed the hops in a warehouse and secured warehouse receipts, which were turned over to the bank to be held as security for his loan. At the time plaintiff accepted these hops from the growers the market price of the hops, f.o.b. Moxee, was 9½¢ a pound. Plaintiff took samples of all the hops and delivered them to hop dealers in different parts of the country, as well as to local dealers. The first 20,000 lbs. were sold in October, 1930, to Robert Livesley Co., the highest bidder, for 10¢ per pound, f.o.b. Tacoma dock. The next sale, of 20, 215 lbs., was made to Hal G. Bolam, Yakima, Washington, November 13, 1930, at 14¢ a pound. The third installment of hops - 20,000 lbs. - was sold to Ernecke & Salmstein Co. of Chicago, December 10, 1930, at 15½¢a pound. It thus appears that the hops were sold by plaintiff in three installments during the months in which deliveries were to be made to defendant according to the contract. It is plaintiff's contention that he was damaged to the extent of $2,900 by reason of defendant's failure to carry out the contract, excluding a profit on the transaction and interest on money advanced to the growers, which under the terms of the contract should have been advanced by defendant.

In deciding the case the court evidently found the measure of damages for defendant's breach to be the difference between the contract price and the price realized by the seller when the goods were actually sold, that price being a fair market price at the time of such sale and the sale being made at the time specified under the contract for delivery. The Uniform Sales Act provides that the

made to the grower, plaintiff accepted delivery of the hops from the grower during the month of October, 1940, and paid each of the respondents for the following sums:

Pacific Commercial	-	$[illegible], on the 1st day of [illegible], for [illegible] lbs.
A. S. Beauchamp	-	$[illegible], on the [illegible] day of [illegible], for [illegible] lbs.
C. F. Meyer	-	$[illegible], on the [illegible] day of [illegible], for [illegible] lbs.
Shultz Brothers	-	$[illegible], on the [illegible] day of [illegible], for [illegible] lbs.
Walter Smallian	-	$[illegible], on the [illegible] day of [illegible], for [illegible] lbs.

Thereafter plaintiff placed the hops in a warehouse and received warehouse receipts, which were turned over to the bank to be held as security for his loan. At the time plaintiff accepted these hops from the growers the market price of the hops, i.e., hops, was 8¢ a pound. Plaintiff took samples of all the hops and delivered them to the dealers in different parts of the country, as well as to local dealers. The first delivery, here sold in October, 1940, to Robert Dryanley Co., the Alfred Stater, for 10¢ per pound, i.e., Tacoma lot. The dock sale, of 20,218 lbs., was made to Mel G. Holms, Yakima, Washington, November 14, 1940, at 14¢ a pound. The third installment of hops - 20,000 lbs. - was sold to Kraemer & Fairbanks Co. of Chicago, December 16, 1940, at 8¢ a pound. It also appears that the hops were sold by plaintiff in three installments during the months in which deliveries were to be made to defendant according to the contract. It is plaintiff's contention that he was obliged to the extent of [illegible] by reason of defendant's failure to carry out the contract, excluding a profit on the transaction and interest on money advanced on the growers, which under the terms of the contract should have been advanced by defendant.

In stating the case the court initially found the damage of damages for defendant's breach to be the difference between the market price and the price realized by the seller when the goods were actually sold, that price being a fair market price at the time of such sale and the sale being made at the time specified under the contract for delivery. The Uniform Sales Act provides that the

measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of the contract (sub. sec. (2) sec. 64, par. 67, chap. 121a, Ill. State Bar Stats., 1935) and that where there is an available market for the goods in question the measure of damages, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted. (Sub-section (3) sec. 64, par. 67, chap. 121a, Ill. State Bar Stats, 1935.) Upon this theory the court found that the average sales price of the hops was 15¢ a pound, and awarded plaintiff 5¢ a pound damages on 60,000 lbs., and entered judgment for $1,800. The court was evidently in error in his computation, for if the difference between the contract price and the sale price was 4¢ a pound, plaintiff was entitled to recover $2,400, and for this difference plaintiff has assigned cross-error.

Defendant advances some ten propositions as grounds for reversal, but the paramount issue involved relates to the question of damages and we think the court's theory in assessing damages is sustained by the authorities cited in plaintiff's brief. Defendant failed to perform his contract. There is no dispute as to that, and the only reason assigned for his breach is his inability to pay. Under the circumstances the measure of damages would be the difference between the contract price and the market price. It was so held in Finlay v. Swirsky, 98 Conn. 666. That case is similar in fact, and precisely in point. Plaintiffs and defendants in that proceeding had entered into contracts concerning the sale of sugar to be shipped from Java to New York during the succeeding July, August or September, at the seller's option. Plaintiffs purchased sufficient sugar to carry out the contract, and notified defendants of that fact. To take care

measure of damages in the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of the contract (sub. sec. (2) par. (a), chap. 148a, Ill. Stats Ann Stats., 1932) and that where there is an available market for the goods in question the measure of damages, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted. (Sub-section (3) sec. 64, par. (a), chap. 148a, Ill. Stats Ann Stats., 1932). Upon this theory the court found that the average sales price of the hops was 12¢ a pound, and therefore plaintiff is a great creditor of defendant, and entered judgment for $1,000. The court was evidently in error in his computation, for if the difference between the contract price and the sale price was 4¢ a pound, plaintiff was entitled to recover $2,400, and for this difference plaintiff has assigned cross-error.

Defendant advances some two propositions as ground for reversal, but the principal issue involved relates to the question of damages and we think the court's theory in assessing damages is sustained by the authorities cited in plaintiff's brief. Defendant failed to perform his contract. There is no dispute as to that, and the only reason assigned for his breach is his inability to pay. Under the circumstances the measure of damages would be the difference between the contract price and the market price. It was so held in Finney v. Swinney, 96 Conn. 666. That case is similar in fact, and precisely in point. Plaintiffs and defendants in that proceeding had entered into contracts concerning the sale of hops to be shipped from Lewis to New York during the succeeding July, August or September, as the seller's option. Plaintiffs performed sufficient hops to carry out the contract, and notified defendants of that fact. To take care

of the payments contemplated by the agreement defendants were to open a credit for the invoice price of $358,400 in a New Haven bank. They established credit for only $150,000, however, and when the period during which shipment was to be made had expired plaintiffs notified defendants that unless they would establish the stipulated bank credits, the sugar would be disposed of elsewhere for their account and they would be held responsible for the damages resulting from their breach. Defendants paid no attention to the notice, and thereafter plaintiffs sold the sugar mentioned at fair and reasonable prices under the then existing market conditions. In an exhaustive opinion the court concluded that (p. 872)

> "The party not in default may, if he choose, accept the renunciation of the other party and annul the contract so that it shall be as if it had never been made; or, if he prefer, may terminate and abandon the further performance of the contract, without retroactive effect, and leaving each party under the liabilities or with the rights and remedies which have arisen from the conditions existing at the time when the contract was thus cut off. Which choice has been selected in any case must be determined by fair interpretation of the language used to indicate intention, and in the light of the conditions and circumstances present at the time the intention was distinctly and finally made known."

In the instant case the notice served upon defendant stated that plaintiff had "elected to cancel and terminate said contract." It was his privilege to do so, and in so doing he brought himself within the decision cited. Defendant takes the position that the notice of rescission served in this case had the effect of destroying plaintiff's right to damages, and effecting a release and discharge of defendant. That phase of the subject was discussed in Finlay v. Swirsky, supra; and passed upon in the case of Plunkett v. Comstock-Cheney Co., 211 App. Div. 737, 208 N. Y. S. 93. That case involved damages for breach of a contract of sale. Notice of rescission of the contract was given by the buyer to the seller, wherein it was stated that the buyer would not accept or pay for the balance of the lumber remaining undelivered, and following the buyer's repudiation,

of the property contemplated by the agreement between the parties was to open a credit for the larger part of [illegible], in a [illegible] bank. They established credit for only [illegible], however, and when the period during which delivery was to be made had expired plaintiff's solicitor telephoned that unless that would establish the stipulated credit, the buyer would be released of liability for their account and they would be held responsible for the charges resulting from their breach. Defendants paid to stipulation in the matter, and thereafter plaintiff sold the sugar mentioned in this and preceding paragraphs under the same stipulation and conditions. It is not material to relate the steps mentioned thus (p. 272):

"The party who is ready, may, if he chooses, accept the renunciation of the other party and demand the assistance to that it shall be as if it had never been made; or, if he prefers, may commence and continue the [illegible] performance of the contract, without returning effect, and leaving such party under the liability or with the rights and remedies which may arise from the conditions existing at the time when the contract was made or at. Which course has been selected in any case must be determined by fair interpretation of the language used in individual instances, and in the light of the conditions and circumstances present at the time the decision was finally and finally made known."

In the instant case the notice based upon information which that plaintiff had "elected to cancel and terminate said contract," it was his privilege to do so, and in so doing he brought himself within the decision cited. Defendant taken the position that the notice of rescission served in this case had the effect of destroying plaintiff's right to damages, and effecting a release and discharge of defendant. This phase of the subject was discussed in Fuller v. Bakery, supra, and proper application in the case of Illinois v. Dearborn Company Co., 211 App. Div. 727, 208 N. Y. S. 93. That case involved damages for breach of a contract of sale. Notice of rescission of the contract was given by the buyer to the seller, wherein it was stated that the buyer would not accept or pay for the balance of the lumber remaining undelivered, and following the buyer's repudiation,

the seller notified the buyer by letter that they had elected to treat the buyer's repudiation as a breach of the contract. Defendant contended that the expression used, "We hereby notify you of our election to consider these contracts and orders rescinded," amounted to an indication that the seller intended to regard the contracts as absolutely ended for all purposes, but the court held otherwise, saying: (p. 97)

"The court of Appeals has frequently used the words 'rescind,' 'rescinded,' and 'rescission,' in connection with an anticipatory breach, as expressive of the election to treat the repudiation as a complete breach of the contract which would give rise to an immediate right of action for damages. (Citing numerous New York cases.) Judge Chase, in the opinion of the court in Wester v. Casein Co. of America, 206 N. Y. 506, at p. 515, 100 N. E. 491, uses this term as indicating an intention to treat the contract as broken. He says:

"'If the defendant wholly repudiated the contract, the plaintiffs were at liberty, at least at their option, to rescind the whole contract and sue for the damages arising from a complete breach.'

"The context of the letter of January 10, 1922, shows that the words 'as rescinded' were used by plaintiffs in the same sense as the words 'to rscind' were used invariably in opinions ruling in like conditions in appellate courts."

Certain objections were made to depositions taken and introduced in evidence by plaintiff as to the market value of hops during the period in question. Defendant had made a motion to suppress the depositions prior to the trial, but the record does not disclose the reasons for the motion, the basis upon which it was made or the parts of the depositions to which defendant objected. It merely appears that the motion was made and overruled. These objections were apparently not renewed when the depositions were read at the trial, nor has defendant preserved in the record his motion to suppress and the reasons therefor. The objections made upon the reading of the depositions at the trial, of which defendant now complains, were all objections that should have been made upon the taking of the depositions, for if they were not well founded they could have been cured by further evidence or by additional testimony and further questioning. Most of them related to the violation of the "best evidence" rule,

the police notified the buyer by letter that they had closed to treat the buyer's repudiation as a breach of the contract. Defendant contended that the expression used, "we hereby notify you of our election to consider these contracts and orders rescinded," amounted to an intimation that the police intended to regard the contracts as mutually ended for all purposes, but the court held otherwise. Id., p. 571.

"The words of speech has frequently used the words 'rescind,' 'rescinded,' and 'rescission,' in connection with an antipathetic attack, in consequence of the election to treat the repudiation as a complete breach of the contract which would give rise to an immediate right of action for damages. Citing numerous New York cases. Judge Cheney, in the opinion of the court in Lamar v. Pfeifle Co. of Decatur, 206 N. Y. 304, at p. 312, 100 N. E. 419, uses this term in instructing an interpleader to treat the contract as broken. He says:

"If the defendants wrongly repudiated the contract, the plaintiffs were at liberty, at least at their option, to treat the whole contract at an end for the damages arising from a complete breach."

"The contract of the Decree of January 13, 1922, shows that the words 'we rescinded' were used by mistake in the same sense as the words 'we invited' were used inadvertently in addition thereto in the resolutions in question."

Certain objections were made to depositions taken and introduced in evidence by plaintiff as to the manner taking of large portion of the petition in question. Defendant had made a motion to suppress the depositions prior to the trial, but the record does not disclose the reasons for the motion, the basis upon which it was made or the parts of the depositions to which defendant objected. It merely appears that the motion was made and overruled. These objections were apparently not renewed when the depositions were read at the trial, nor has defendant preserved in the record his motion to suppress and the reasons therefor. The objections made upon the reading of the depositions at the trial, of which defendant now complains, were all objections that should have been made upon the taking of the deposition, for if they were not well founded they could have been cured by further evidence or by additional testimony and further questioning. Most of them related to the violation of the "best evidence" rule,

and were technical in nature. It has been held that an objection to testimony taken by deposition that it is not the best evidence comes too late if made at the trial (Dunbar v. Gregg, 44 Ill. App. 527), and that objections to depositions which might have been obviated by retaking comes too late after the cause is called for trial. (Kassing v. Mortimer, 80 Ill. 602; Richman v. South Omaha National Bank, 76 Ill. App. 637.) Plaintiff's case was made almost entirely by depositions of witnesses in the State of Washington, where these hops were grown, who were familiar with the trade customs, market conditions and prices. Evidently defendant was not present when the depositions were taken, and since no objections were made as to the materiality of the evidence it would be unjust to allow defendant's objections, made for the first time upon the reading of the depositions, to be sustained.

We have considered the numerous points urged by defendant, but upon careful consideration of the record and briefs of both parties we have reached the conclusion that the trial court gave both parties a fair hearing, that there was no error in the court's rulings on the admissibility of evidence, and that the court reached the only conclusion that could fairly have been reached, namely, that there was a breach of the contract on the part of defendant for which he should be held to respond in damages to plaintiff. The measure of damages employed by the court in arriving at the sum of $1,800 is in accordance with the provisions of the statute and the authorities hereinbefore cited. However, upon the court's own theory plaintiff should have had judgment for $2,400 instead of $1,800, and therefore the judgment of the circuit court will be reversed and judgment entered here for $2,400 and costs in favor of plaintiff and against defendant.

Plaintiff was obliged to file an additional abstract of

and were included in error. It has been held that an objection in deminimy based on disposition that it is not the best evidence cannot be made at the trial (Dunbar v. Brown, 4 III. App. 227), nor that objections to depositions which might have been obtained by motion come too late after the cause is called for trial. (Kessler v. Kirkner, 20 III. 548; Bingham v. Chicago Railroad Co., 74 III. App. 627.) Plaintiff's case was made clearly by deposition of witnesses in the state of Washington, where these depos were taken, who were familiar with the facts relied, direct questions and answers. Defendant introduced no witnesses when the depositions were taken, and since on objections were made as to the materiality of the evidence it would be subject to mere defendant's objections, made for the first time upon the trial of the deposition, to be overruled.

We have considered the numerous points urged by defendant, but upon careful consideration of the record and briefs of both parties we have reached the conclusion that the total verdict was both proper & fair therein, that there was no error in the verdict, nothing on the admissibility of evidence, and that the court rendered the only conclusion that could fairly have been reached, namely, that there was a breach of the contract on the part of defendant for which he should be held to compensate in damages to plaintiff. The amount of damages assessed by the court in arriving at the sum of $3,600 is in accordance with the provisions of the statute and the authorities heretofore cited. However, upon the court's own theory plaintiff should have had judgment for $3,600 instead of $1,800, and therefore judgment of the circuit court will be reversed and judgment entered here for $3,600 and costs in favor of plaintiff and against defendant.

Plaintiff was entitled in fact to additional interest of

record, which supplied certain evidence not included in the abstract filed by defendant, necessary to a proper consideration of the cause. Under the rules of this court the costs of the additional abstract will be taxed against defendant, and it is so ordered.

REVERSED AND JUDGMENT HERE FOR PLAINTIFF
AND AGAINST DEFENDANT FOR $2,400 AND COSTS.

Scanlan, P. J., and Sullivan, J., concur.

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38162

PEOPLE OF THE STATE OF ILLINOIS
for the use of ROBERT C. HOOPER,
(plaintiff below)
Appellant,

v.

JOHN F. HESTERMAN et al.,
(defendants below).

ARTHUR C. MARRIOTT,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

283 I.A. 635

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois filed suit in the Superior court of Cook county, for the use of Robert C. Hooper, upon the bond of the sheriff of DuPage county, to recover damages for the refusal of the sheriff to execute a deed to Hooper for property which had been sold under execution. The time of redemption had expired and the certificate assigned to Hooper had been delivered by him to the sheriff with a request that the deed issue. The three defendants sued were all residents of DuPage county. Following service upon Arthur C. Marriott, one of the defendants, in Cook county, he filed a motion in the nature of a two-fold plea to dismiss the cause for want of jurisdiction, averring that

"None of the defendants reside in Cook County; that they are all residents of DuPage County; that the transaction occurred in DuPage County; that there is another action now pending between the same parties and for the same cause of action in the District Court of the United States, which * * * is still pending."

Thereupon plaintiff moved that defendant's appearance be deemed general and that he be ordered to file an answer to the merits.

MR. JUSTICE STAND DELIVERED THE OPINION OF THE COURT:

The People of the State of Illinois filed suit in the Superior court of Cook county, for the use of Robert G. Hooper, upon the bond of the sheriff of Madge county, to recover damages for the refusal of the sheriff to execute a deed to Hooper for property which had been sold under execution. The time of redemption had expired and the certificate required to Hooper had been delivered by him to the sheriff with a request that the deed issue. The three defendants sued were all residents of Madge county. Following service upon Arthur G. Harrisch, one of the defendants, in Cook county, he filed a motion in the nature of a two-fold plea to dismiss the cause for want of jurisdiction, stating that

"Two of the defendants reside in Cook County; that they are all residents of Madge County but the transaction occurred in Madge County; that Illinois statutes authorize now pending between the same parties and for the same cause of action in the District Court of the United States, which * * * is still pending."

Thereupon plaintiff moved that defendant's appearance be treated general and that he be ordered to file an answer to the merits.

Plaintiff's motion was denied, defendant's motion allowed, and the case was dismissed for want of jurisdiction. This appeal followed.

It must be conceded that Marriott's plea, challenging the court's jurisdiction as to his person, if standing alone, would have justified dismissal of the cause, since section 7, paragraph 135 (Illinois State Bar Stats., 1935, chap. 110) provides that

> "Except as otherwise provided in this Act, every civil action shall be commenced in the county where one or more defendants reside or in which the transaction or some part thereof occurred out of which the cause of action arose. * * *"

It is urged, however, that by coupling the question of personal jurisdiction with that of a prior action pending, Marriott waived his right to the former plea and submitted himself to the jurisdiction of the court. In support of this position plaintiff argues that the plea of a prior suit pending calls for a determination of the matters alleged in the second suit and a comparison thereof with the subject matter of the suit then pending; that this invokes the exercise of jurisdiction and makes the appearance general, since defendant cannot by his voluntary action invite the court to exercise jurisdiction in determining whether there is an identity of parties and subject matter in the two proceedings and at the same time deny that jurisdiction exists. Plaintiff cites and relies principally upon two Illinois cases. The first of these is Nicholas v. People, 165 Ill. 502. In that case the county court rendered judgment on the application of the collector of Cook county against the lands of appellant returned as delinquent, for a special assessment levied by the city of Chicago. Appellant filed his written appearance in the county court stating that he appeared specially for the purpose of his motion only, and objected to the jurisdiction of the court. He moved to dismiss the application for judgment, and in support of his motion stated

Plaintiff's motion was denied, defendant's motion allowed, and the case was dismissed for want of jurisdiction. This appeal follows.

It must be conceded that Mortlott's plea, challenging the court's jurisdiction as to his person, if meaning alone, would have justified dismissal of the cause, since section 7, paragraph 118 (Illinois Statutes Ann Cbdo., 1954, chap. 110) provides that:

"Except as otherwise provided in this act, every civil action shall be commenced in the county where one of the defendants resides or in which the transaction or some part thereof occurred out of which the cause of action arose. * * *"

It is urged, however, that by complying the question of personal jurisdiction with that of a prior motion pending, Mortlott waived his rights in the manner plea and submitted himself to the jurisdiction of the court. In support of this position plaintiff argues that the plea of a prior suit pending calls for a determination of the matters alleged in the second suit and a comparison thereof with the subject matter of the suit then pending. Yet this further the purpose of jurisdiction and makes the appearance general, since defendant moved by his motion. Any motion invite the court to exercise jurisdiction in determining whether there is an identity of parties and subject matter in the two proceedings and at the same time deny that jurisdiction exists. Plaintiff cites and relies principally upon the Illinois decision. The first of these is Mitchelson v. Tenney, 140 Ill. App. In that case the county court rendered judgment on the application of tax collector of Cook county against the lands of appellant. Attorney as defendant, for a special assessment levied by the city of Chicago. Appellant filed his petition questioning in the county court stating that he appeared specially for the purpose of his motion only, and objected to the jurisdiction of the court. He moved to dismiss the application for judgment, and in support of his motion stated

seven objections to the proceeding. The first and second of these objections were that the notice published by the collector was insufficient. The objections were heard and appellant proved by the county surveyor that the lands could not be identified from the descriptions contained in the notice. Thereupon the court on motion of the collector permitted an amendment of the notice so as to correctly describe the land. The tax, judgment, sale, redemption and forfeiture record showing the property were offered in evidence. The motion to dismiss and the objections were overruled, and appellant moved for a new trial, which was also overruled and judgment entered. The Supreme court held that the notice published was so defective that the court acquired no jurisdiction by virtue thereof, since the land could not be identified from the description, and said that if appellant did not submit to the jurisdiction of the court such jurisdiction would not be acquired by amendment of the notice. In discussing the question here under consideration the court said that a special appearance must be for the purpose of urging jurisdictional objections only and must be confined to a denial of jurisdiction; that if a defendant appears to the merits (p. 504) "no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not." In that case, however, it clearly appears from the court's opinion that appellant in entering his appearance did not confine himself to the question of jurisdiction, but stated seven objections against the proceeding, the last of which was:

> "That the improvement for which said assessment was made has been built and paid for by these objectors at their own private expense, and the same has been approved and accepted by the City of Chicago."

The Supreme court said that by this objection appellant called upon the court to hear and decide the question whether the imrpovement had

extra objections as the proceeding. The first two counsel of these objections were that the notice published by the collector was insufficient. The objections were heard and overruled, proved by the county surveyor that the lands could not be identified from the descriptions contained in the notice. Thereupon the court on motion of the collector permitted an amendment of the notice so as to correctly describe the land. The law, judgment, sale, confirmation and certificate issued during the pendency were allowed to stand. The notice to claimant and the objections were structured, and appealed novel for a new trial, which was also overruled and judgment entered. The supreme court held that the notice published was so defective that the court acquired no jurisdiction by virtue thereof, since the land could not be identified from the description, and said that if objections did not submit to the jurisdiction of the court such jurisdiction would not be required by amendment of the notice. In discussing the question here under consideration the court said that a special appearance had be for the purpose of urging jurisdictional objections only and must be confined to a denial of jurisdiction; that if a defendant appears in the matter (p. 404) "no statement that he does not will suffice, and if he makes a defense which can only be maintained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not." In that case, however, it clearly appears from the court's opinion that appellant in entering his appearance did not confine himself to the question of jurisdiction, but raised seven objections against the proceeding, the last of which was:

"That the improvement for which said assessment was made has been built and paid for by those objectors at their own private expense, and the same has been approved and accepted by the city as its sidewalk."

The supreme court held by this objection appellant called upon the court to hear and decide the question whether the improvement had been built and paid for by those objectors at their own private expense, and the same has been approved and accepted by the city as its sidewalk."

been built, paid for and accepted, as alleged. (p. 504) "This the court could only do upon the hypothesis that it had jurisdiction, and the objection clearly went to the merits. He could not invoke the judgment of the court on all his objections without a general appearance, and could not in the same paper ask for an exercise of such jurisdiction and disclaim an intention to submit to it."

In Ladies of Maccabees v. Harrington, 247 Ill. 511, the other case relied on by plaintiff, appellant, a fraternal beneficiary society organized under the laws of Michigan, issued a certificate to Ellen Hickey for the sum of $1,000. The beneficiaries named therein were nieces of Ellen Hickey. Subsequent to her death and the refusal of the society to pay the amount mentioned in the certificate an action of assumpsit was brought by the beneficiaries in the city court of Chicago Heights, and the summons directed to the sheriff of Sangamon county commanded him to summon the society to appear before the city court of Chicago heights. In apt time the society appeared specially and filed five pleas to the jurisdiction of the court, setting forth in substance that the supposed contract upon which the action was brought was not made within the city of Chicago Heights nor its territorial limits, nor made specifically payable in the city of Chicago Heights, but that the cause of action accrued in Chicago, in the county of Cook; that neither of the plaintiffs nor the defendant resided in Chicago Heights at the time of, nor since, the commencement of the suit; that the defendant was not found nor served with process in said cause in the city of Chicago Heights; that plaintiffs were at the time of the commencement of suit and at all times thereafter residents of Chicago; that defendant is a corporation duly organized, existing and doing business under the laws of the State of Michigan; that service of process was actually had on defendant in Sangamon county, Illinois, and outside the territorial limits

been held, paid for and accepted, as alleged. In 2001 "This
the court only in view the Appellants that it had juris-
diction, and the objection timely made to the merits. We could
not invoke the judgment of the court on all its objections without
a general appearance, and could not in the same breath ask for an
exercise of such jurisdiction and disclaim an intention to submit
to it."

In Lodge of Commerce v. Bartmann, 247 Ill. 511, the
other case relied on by plaintiff, appellant, a fraternal beneficiary
society organized under the laws of Michigan, issued a certificate
in this state by the use of [illegible]. The certificate based there-
in were issued of this state. Subsequent to the death and the pre-
ferred of the society in the amount specified in the certificate
an action of assumpsit was brought by the beneficiaries in the city
court of Chicago against the summons directed to the sheriff
of Tuscarawas county commanded. His to summon the society in square
before the city court of Chicago Heights. In the time the society
appeared specially and filed five pleas to the jurisdiction of the
court, setting forth in substance that the supposed contracts upon
which the action was brought was not made within the city of Chicago
Heights nor the territorial limits, nor made specifically payable in
the city of Chicago Heights, but that the cause of action accrued in
Chicago, in the county of Cook that neither of the plaintiffs nor
the defendants resided in Chicago Heights or the time of, nor since,
the commencement of the suit; that the defendant was not found nor
served with process or said cause in the city of Chicago Heights; that
plaintiffs were at the time of the commencement of said suit and still
there thereafter residents of Chicago; that defendant is a corporation
duly organized, existing and being business under the laws of the
state of Michigan; that service of process was actually had on defend-
ant in Tuscarawas county, Illinois, and outside the territorial limits

of Chicago Heights, which is situated in Cook county; and that in the county of Cook there are a circuit and superior court, both of which had jurisdiction over plaintiffs and defendant. The major portion of the opinion is devoted to a discussion of the question whether the city court of Chicago Heights obtained jurisdiction of the person of the defendant and had the power under the service had to render a judgment in personam against it, and the court concluded that there was no jurisdiction, and reversed judgment entered by the trial court. Subsequently, on petition for rehearing, the court filed an additional opinion and considered a new ground urged for sustaining the judgment, namely, that the defendant waived the objection to the jurisdiction of the court by appearing to the merits after the court had sustained demurrers to the several pleas to the jurisdiction of the court. In considering the new ground urged, the court cited Nicholes v. People, supra, holding generally that a special appearance must be for the purpose of urging jurisdictional objections only, and must be confined to a denial of jurisdiction, and that an appearance for any other purpose than to question the jurisdiction of the court is general, and laid down the rule that when the question is presented whether a defendant has appeared to the merits and thus waived the question of jurisdiction over his person, the test is whether the defendant has "made a defense or taken other steps in the cause the disposition of which involves the exercise of jurisdiction. If the defendant appears and makes a motion or files a plea or takes any other step which the court would have no power to dispose of without jurisdiction of the defendant's person, such action on the part of the defendant would be a submission of his person to the jurisdiction of the court and will be a waiver of any objections to the jurisdiction." The court then pointed out that after demurrers to the several pleas filed in that case had been sustained the record

of Chicago decision, which is followed in Cook County and that in the county of Cook there are - criminal and superior courts, both of which had jurisdiction over juvenile and delinquents. The major portion of the opinion is devoted to a discussion of the question whether the only court of Chicago having chancery jurisdiction of the person of the defendant was the juvenile court. The court said the power under the statutes had to render a judgment in personam against it, and the court concluded that there was no jurisdiction, and reversed judgments entered by the trial court. Subsequently, on petition for rehearing, the court filed an additional opinion and considered a new ground urged for sustaining the judgment, namely, that the defendant waived the objection to the jurisdiction of the court by appearing in the matter after the court had sustained demurrers in the original plea to the jurisdiction of the court. In considering the new ground urged, the court stated (Italics, ibid.): "Nothing contrary to the rule that a special appearance must be for the purpose of raising jurisdictional objections only, and must be confined to a denial of jurisdiction, and that an appearance for any other purpose than to question the jurisdiction of the court is general, and laid down the rule that when the question is presented whether a defendant has appeared to his motion and thus waived the question of jurisdiction over his person, the test is whether the defendant has "made a defense or taken other steps in the court the disposition of which involves the question of jurisdiction. If the defendant appears and makes a motion or files a plea or takes any other step which the court could have no power to dispose of without jurisdiction of the defendant's person, such action on the part of the defendant would be a submission of his person to the jurisdiction of the court and will be a waiver of any objections to the jurisdiction." The court then pointed out that after demurrers to the several pleas filed in that case had been sustained the tenth

showed that defendant elected to stand by his pleas and refused to plead further, whereupon the court proceeded to hear the evidence and assess the damages; that defendant objected to the court taking jurisdiction for the purpose of assessing damages, and excepted to its action and to the rendition of the judgment; that defendant subsequently moved the court to expunge its judgment from the record, for the reason that the court had no jurisdiction to render the judgment; that in each instance defendant limited its appearance for the sole purpose of questioning the jurisdiction of the court, and for no other purpose, and based its objections on the want of jurisdiction. The opinion states that

> "There was nothing in any of the steps taken by appellant in the court below that required the exercise of jurisdiction to dispose of them. It was wholly unnecessary for the defendant to follow up its pleas to the jurisdiction of the court by objecting to the subsequent proceedings on the ground that the court had no jurisdiction of the person of the defendant, but, since all of these objections are entirely consistent with appellant's pleas to the jurisdiction, it is difficult to see how they can be held to amount to a waiver of the jurisdictional question."

Neither of these cases sustain plaintiff's position. In the Nicholes case defendant did not confine himself to the question of jurisdiction, but stated objections relating to the merits of the cause which required the court to hear and decide facts upon the hypothesis that it had jurisdiction, and as the court pointed out you cannot in the same paper ask for an exercise of jurisdiction and at the same time disclaim an intention to submit to it. The Ladies of the Maccabees v. Harrington case, supra, supports the position of defendant in this proceeding, and does not in anywise aid plaintiff, since the court specifically held that there was nothing in any of the steps taken by appellant in the court below that required the exercise of jurisdiction to dispose of them.

Marriott's motion to dismiss raised two points:

(1) The authority of the court to try the case because of the nonresidence of the defendants in Cook County; and

shown that defendant failed to stand by his plea and refused to plead further, thereupon the court proceeded in due the proceedings and assess the damages; that defendant objected to the court taking jurisdiction for the purpose of assessing damages, and excepted to its action and to the rendition of the judgment; that defendant subsequently moved the court to vacate the judgment from the record, for the reason that the court had no jurisdiction to render the judgment that is such further defendant claimed the appearance for him was a mere ministerial act, and that the validity of the court, and for other purpose, and based the objections on the ground of jurisdiction. The opinion states that

"There was nothing in any of the steps taken by defendant in the court below that could properly be construed as a voluntary submission to jurisdiction of the court. It was merely announcing the intention to refrain from the plea of the jurisdiction of the court, or delaying the submission of the question of the jurisdiction of the person of the defendant, and, since all of these objections are entirely consistent with unwillingness plead the jurisdiction, it is difficult to see how they can be held to amount to a waiver of the jurisdictional question."

Neither of these cases sustain plaintiff's position. In the Hindman case defendant did not confine himself to the question of jurisdiction, but raised objections relating to the merits of the cause which required the court to hear and decide facts upon the hypothesis that it had jurisdiction, and so the court pointed out you cannot in the same breath ask for an exercise of jurisdiction and at the same time disclaim an intention to submit to it. The Dallas of the Dallas case, supra, regarding the position of defendant in this proceeding, the case was in effect said plaintiff, since the court specifically held that there was no motion in any of the other ways by appearance in the court before that required the exercise of jurisdiction to dispose of them.

Appellee's motion to dismiss raises two points:

(1) The validity of the order in by the case because of the nonresidence of the defendant in Cook County; and

(2) The authority of the court to try the case because of the pendency of an identical suit brought by the same plaintiff against the defendants in the U. S. District Court.

Both of these points are in the nature of dilatory defenses, which under subsection 3 of sec. 43, chap. 110 (Illinois State Bar. Stats. 1935) may be pleaded at the same time.

The statute provides that

"All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first. * * *"

When the court ruled upon the plea of the defendant that it had no right to try the cause of action for either or both of the reasons assigned by defendant, its ruling was not made in the exercise of jurisdiction but because of a refusal thereof. Both pleas presented questions of a jurisdictional nature, and it was upon this ground and not upon the merits of plaintiff's cause of action that the court dismissed the suit.

The distinction between pleas in abatement and those in bar which go to the merits of the cause is clearly and concisely set forth in Pitts Sons' Mfg. Co. v. Commercial Nat. Bank of Chicago, 121 Ill. 582, as follows:

"Pleas are divided into two general classes, viz., dilatory and peremptory, otherwise designated as pleas in abatement and pleas in bar. A plea in abatement is defined to be, a plea that, without disputing the justness of the plaintiff's claim, objects to the place, mode or time of asserting it, and requires that therefore, and pro hac vice, judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time; while to the second class belong all those pleas having for their object the defeating of the plaintiff's claim. Hence, a plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. Pleas in bar and pleas in abatement have, therefore, this marked distinction: Pleas in bar are addressed to the merits of the claim and as impairing the right of action altogether, whereas pleas in abatement tend merely to divert, suspend or defeat the present suit. 1 Saunders' Pl. & Ev. 1, 2; Comyns' Digest, title 'Abatement'; 1 Chitty's Pl. 441. * * *

"Whenever the subject matter to be pleaded is to the effect that the plaintiff cannot maintain any action at any time, it must be pleaded in bar; while matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should be pleaded in abatement. 1 Chitty's Pl. 445."

(a) The materiality of the report in its use because of the production of an instrument well prepared for the same plaintiff against the defendants in the U. S. District Court.

Both of these points are in the nature of military defenses, which under subsection 3 of sec. 63, chap. 140 (Illinois Stats Ann. 1934) may be pleaded at the same time.

The statute provides that

"All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first. * * *"

When the court ruled upon the plea of the defendants that it had no right to try the cause of action for either or both of the reasons assigned by defendants, its ruling was not made in the exercise of jurisdiction but because of a rational thought. Both pleas presented questions of a jurisdictional nature, and it was upon this ground and not upon the merits of plaintiff's cause of action that the court dismissed the suit.

The distinction between pleas in abatement and those in bar which go to the merits of the cause is clearly and concisely set forth in Fidelity Nat. Bk. Co. v. Commercial Nat. Bank of Chicago, 181 Ill. 88, as follows:

"Pleas are divided into two general classes, viz., dilatory and peremptory, otherwise designated as plea in abatement and plea in bar. A plea in abatement is defined to be, a plea that without disputing the justness of the plaintiff's claim, objects to the plaintiff, made at time of commencing it, and requiring that defendants may be given the benefit of a better plea, or at least have time to open to some one with in another place or form, or at least make that appear to the court which would all than plead having the benefit of the action of the plaintiff's claim. Every a plea in bar of the action may be defined as one which does not present for trying or disputing the action, nor make it appear to that effect. Pleas in bar and pleas in abatement have, therefore, this marked distinction: Pleas in bar are addressed to the merits of the claim and go to impeaching the right of action altogether, whereas pleas in abatement have merely to divert, suspend or defeat the present suit. 1 Chitty's Pl. 6 Ed. 1. 3; Comyn' Digest, title 'Abatement'; 1 Chitty's Pl. 443. * * *

"Whatever the subject matter to be pleaded is to the effect that the plaintiff cannot maintain his action at any time, it must be pleaded in bar; while matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should be pleaded in abatement. 1 Chitty's Pl. 443."

Neither of defendant's pleas presented a defense or defenses to the merits of plaintiff's cause of action. They were not pleas in bar, as defined by the court in Pitts Bens Mfg. Co. v. Commercial Nat. Bank of Chicago, supra, but merely called for a dismissal of the particular suit, leaving plaintiff free to start other proceedings in the proper forum or to prosecute the suit then pending in the U. S. District Court. Counsel evidently confuses the proceeding here followed with the well established doctrine that the filing of a plea in bar operates as a waiver of a plea in abatement previously filed, as was held in Allen v. Watt, 69 Ill. 655, wherein the court declared the rule to be general that all objections to the writ or to the jurisdiction of the person must be urged before the filing of a plea in bar, or they will be waived.

Plaintiff stresses the point that these two pleas were filed together. Since they were both dilatory pleas, we think that was not objectionable. In fact, it was incumbent upon defendant to file these pleas as soon as possible if he wished to challenge the jurisdiction of the court, because the authorities hold that pleas in abatement or dilatory pleas must be filed at the earliest practicable time. (Fisher v. Cook, 155 Ill. 280.) The authorities are in accord on the proposition that where a defendant files a plea to the jurisdiction of a court, and thereafter pursues any course by which he invites the court to consider the merits of the cause, he submits himself completely to the jurisdiction of the court and must abide the consequences, but that was not the situation in this proceeding. In dismissing plaintiff's case the court had no occasion to inquire into the merits thereof, and in fact it never became necessary for the court to do so, because the suit was dismissed for want of jurisdiction and it was immaterial whether the court held that it had no jurisdiction over the defendant's person or no juris-

Failure of litigants's plans presented a defense of laches in the matter of plaintiff's waver of notice. That very not plans in bar, as defined by the court in Lake View Sch. D. v. Commercial Nat. Bank of Chicago, supra, but merely called for a finding of the particular fact, leaving plaintiff free to assert claims pertaining in the proper forum or by pursuance the suit then pending in the U. S. District Court. Counsel strenuously contends the pleading here failures with the well established doctrine that the filing of a plan in bar operates to a waiver of a plea in abatement previously filed, as was held in Lake v. Dahl, 4c Ill. 60, wherein the court evaluated the rule as to wherein that all objections to the suit or to the jurisdiction of the person must be urged before the filing of a plea in bar, or they will be waived.

Plaintiff discovers the point that these two plans were filed together. Even they were both dilatory plans, as which plaintiff was not objectionable. In fact, it was immaterial upon defendant to file those plans as soon as possible if he wished to challenge the jurisdiction of the court, because the substantive bar that plaintiff in abatement or dilatory plans must be filed at the earliest practicable time. (Fisher v. Cook, 1c3 Ill. 4c.) The contention was in accord on the proposition that wherein defendant files a plea to the jurisdiction of a court, and thereafter pursues any course by which he invites the court to consider the merits of the cause, he waives strictly compliance to the jurisdiction of the court and must abide the consequences, but does not the attention in this proceeding. In dismissing plaintiff's case the court had no occasion to inquire into the merits thereof, and it that is never because necessary for the court to do so, because the suit was dismissed for want of jurisdiction and it was unnecessary whether the court had jurisdiction of the subject matter of the controversy or not. Plaintiff's petition

diction over the particular suit, because either reason was sufficient in itself to sustain the dismissal order.

For the reasons stated herein the judgment of the trial court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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38219

LOUIS DAVIS,
(plaintiff below) Appellee,

v.

HENRY D. BABSON et al.,
(Defendants below).

1324 NORTH CLARK STREET
CORPORATION, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

283 I.A. 635

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1933, 1324 North Clark Street Building Corporation conducted a public garage in which one Henry D. Babson stored his car. As part of the service rendered, Babson's car was delivered to his home each morning and called for at night. July 31, 1933, Melvin Dietz, night foreman at the garage, noticed Babson's car standing in front of his residence. He proceeded to the garage and upon receiving a telephone call from a Miss Kosek, whom he had left at the foot of Ohio street earlier in the evening, informed her that he would call for her and drive her to Ohio and Clark streets, from where she could take a street car home. Dietz then proceeded to Babson's home, obtained the key for the car from Babson's doorman and instead of returning the car directly to the garage, which was located north of the Babson home, drove south and east to Ohio street and the lake, called for his friend and was driving with her west on Ohio street toward Clark street when he became involved in a collision just west of Michigan avenue with two other cars parked

MR. JUSTICE SCHAD DELIVERED THE OPINION OF THE COURT.

In 1928, John Irwin Clark owned Building Corporation conducted a public garage in which one Henry G. Hudson stored his car. As part of the service rendered, Hudson's car was delivered to his home each morning and called for at night. July 31, 1928, Melvin Hicks, night keeper at the garage, noticed Hudson's car standing in front of his residence. He proceeded to the garage and upon receiving a telephone call from a Miss Hosch, whom he had left at the door of this street waiting in the morning, informed her that he would call for her and drive her to the [illegible] street, from where she could take a street car home. Hicks then proceeded to Hudson's home, obtained the key for the car from Hudson's daughter and instead of returning the car directly to the garage, which was located north of the Hudson home, drove south and east to this street and the lake, called for his friend and was driving with her west on Ohio street toward Clark street when he became involved in a collision just east of Michigan avenue with two other cars parked

on Ohio street, one belonging to W. H. Fogel and the other to Louis Davis, the plaintiff herein.

Fogel instituted suit in the municipal court, joining 1324 North Clark Street Building Corporation, Melvin Dietz and Henry D. Babson, as defendants. The suit was dismissed as to Babson prior to trial, and after a hearing before the court without a jury judgment was entered in the sum of $90 against Dietz and the corporation. Upon appeal to this court judgment was affirmed as to Dietz, but reversed as to the corporation. (W. H. Fogel v. 1324 North Clark Street Bldg. Corp. et al., Gen. No. 37571, unpublished opinion filed December 31, 1934.) We there held that the corporation was not liable because the evidence did not justify the conclusion that Dietz, its servant, was acting within the scope of his employment at the time of the collision but was engaged on a mission of his own, not connected with his duties as an employee of defendant's garage.

Subsequently Louis Davis, plaintiff herein, whose car was damaged at the same time as Fogel's, instituted suit against the same three defendants. Trial was had before the court without a jury, resulting in a judgment in favor of Babson and against plaintiff for costs, and judgments of guilty in favor of plaintiff and against defendants 1324 North Clark Street Building Corporation and Melvin Dietz, and assessing plaintiff's damages against the latter two in the sum of $250 and costs. The Corporation alone duly served its notice of appeal and filed the same in the office of the clerk of the municipal court, and thereafter its counsel entered into a stipulation with plaintiff's attorney to extend the time for the filing of defendant's record of proceedings until the case of Fogel v. 1324 North Clark Street Building Corporation, then pending in the appellate court, should be determined. When the opinion in the Fogel case was filed, counsel for defendant corporation took the

on this street, was striking in G. Hugh and the other is Louis Jerry, the plaintiff herein.

Yogel instituted suit in the municipal court, joining 1324 North Clark Street Building Corporation, Melvin Stein and Henry D. Hudson, as defendants. The suit was dismissed as to Hudson prior to trial, but after a trial before the court without a jury judgment was entered in the sum of 750 against Stein and the corporation. Upon appeal to this court judgment was affirmed as to Stein, but reversed as to the corporation. (V. H. Yogel v. 1324 North Clark Street Bldg. Corp. et al., Nos. 34, 37, opinion filed December 21, 1934.) We there held that the corporation was not liable because the evidence did not justify the conclusion that Stein, its servant, was acting within the scope of his employment at the time of the collision but was engaged on a mission of his own, not connected with his duties as an employee of defendant's garage.

Subsequently Louis Jerry, plaintiff herein, whose car was damaged at the same time as Yogel's, instituted suit against the same three defendants. Trial was had before the court without a jury, resulting in a judgment in favor of Hudson and against plaintiff for costs, and judgments of guilty in favor of plaintiff and against defendants 1324 North Clark Street Building Corporation and Melvin Stein, and assessing plaintiff's damages against the latter one in the sum of 1500 and costs. The corporation alone duly served its notice of appeal and filed the same in the office of the clerk of the municipal court, and thereafter its counsel entered into a stipulation with plaintiff's attorney to extend the time for the filing of defendant's record of proceedings until the case of Yogel v. 1324 North Clark Street Building Corporation, then pending in the appellate court, should be determined. Then the opinion in the Yogel case was filed, counsel for defendant corporation took the

necessary steps to perfect its appeal, and May 6, 1935, obtained leave in this court to appeal from the judgment rendered in the municipal court in favor of Davis.

The same question is here presented for determination as was involved in the Fogel case. We have examined the record carefully and find no evidence to warrant the conclusion that Dietz was performing any duty within the scope of his employment at the time of the collision with plaintiff's car for which defendant could be held liable on principles of agency. The burden of proof on this question rested with plaintiff, who failed to show that the use of Babson's car by Dietz was in the course of his employment. In fact, the evidence shows rather conclusively that Dietz was driving the car in his own behalf and had gone several miles out of the way in calling for Miss Kosek and in taking her to the street car prior to the accident. The Fogel case and this suit both rest upon the same facts, and both cars were damaged at the same time. There is no evidence in this case to make Davis' claim against the corporation any stronger than was Fogel's in the other proceeding, and we therefore regard the Fogel case as decisive of this litigation.

For the reasons stated the judgment against the 1324 North Clark Street Building Corporation and Melvin Dietz is reversed as to said Corporation, but is affirmed as to said Dietz.

JUDGMENT REVERSED AS TO ONE DEFENDANT,
BUT AFFIRMED AS TO THE OTHER DEFENDANT.

Scanlan, P. J., and Sullivan, J., concur.

necessary steps to perfect the appeal, and Apr 6, 1898, obtained leave in like court to appeal from the judgment rendered in the municipal court in favor of Davis.

The same question is here presented for determination as was involved in the Ingal case. I have examined the record carefully and find no evidence to warrant the conclusion that Hicks was performing any duty within the scope of his employment at the time of the collision with Plaintiff's car for which defendant could be held liable on principles of agency. The burden of proof on this question rested with plaintiff, who failed to show that the use of Dobson's car by Hicks was in the course of his employment. In fact, the evidence shows rather conclusively that Hicks was driving the car in his own behalf and had gone several miles out of the way in waiting for Mrs. Lamb and in taking her to the depot and prior to the accident. The Ingal case and this case both had been upon the same facts, and both were argued at the same time. There is no evidence in this case to make Davis' claim against the corporation any stronger than was Ingal's in the other proceeding, and we therefore regard the Ingal case as decisive of this litigation.

For the reasons stated the judgment against the Lake North Park Dummy Building Corporation and Edwin Hicks is reversed as to said Corporation, but is affirmed as to said Hicks.

JUDGMENT ACCORDING TO THE OPINION.

MR. JUSTICES DO TO THE OPINION DISSENTING.

Boggins, P. J., and Phillips, J., concur.

38630

THILDE L. SONNENBERG,
Appellee,

vs.

ARABELLA R. ORR, LOUIS T. ORR et al.,
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

283 I.A. 636

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Circuit court appointing a receiver. September 27, 1935, Thilde L. Sonnenberg filed her complaint to foreclose a trust deed, to which Louis T. Orr, one of the makers of the notes, and Mary C. Orr, the owner of the equity of redemption, filed their answer and three supporting affidavits. It appears from the complaint and answer filed that the original loan amounted to $56,000. May 10, 1932, the balance of the loan, which had been reduced to $50,562.14, was extended by written agreement to April 20, 1935, with interest at the rate of 7% per annum, payable monthly. Under the extension agreement the management of the building remained in Louis T. Orr and his wife until October 20, 1935, and it was provided that on May 20, 1933, and on the 20th day of each succeeding month up to and including October 20, 1935, the Orrs were to deposit all of the net rents with the Northern Trust Company, as escrowee. The operating expenses of the building were to be paid from the gross rents and plaintiff was to receive each month the sum of $294.93, as interest. No expenditures were to be made by the Orrs in excess of the sum of $75 without plaintiff's approval. A bond for the faithful performance of the agreement was executed by Orr.

The Orrs continued to collect the rents, to pay interest, and to deposit the net income with the Northern Trust Company, until the month of September, 1935. It appears from the record that subsequent to the extension agreement of May, 1932, plaintiff

has received $294.93 interest each month, aggregating $8,552.97. In addition thereto the Orrs deposited each month with the Northern Trust Company, as net rentals, an average of $270, aggregating $7,830.97. Taxes for the years 1931, 1932 and 1933, have been paid out of the moneys deposited with the Northern Trust Company. Taxes for the years 1928, 1929 and 1930, to which objections were filed and are pending and undisposed of in the County court, are unpaid. There is now on deposit with the Northern Trust Company, and available for the payment of taxes, the sum of $2,663.77 and a Liberty bond for the sum of $300.

The complaint alleges that the premises, the value of which it is alleged does not exceed $40,000, are sunk security for the indebtedness secured by the trust deed. Louis P. Orr's sworn answer avers that he has been engaged in the real estate business for more than twenty years, and that the building is worth at least $100,000. To support the answer defendants filed the affidavit of Edward B. Frysinger, stating that he had been engaged in the real estate business for more than thirty years, is familiar with the real estate in question and that it is reasonably worth the sum of $110,000; the affidavit of Alfred G. Mahony that he had been engaged in the real estate business in Chicago for more than twenty years, is familiar with the property being foreclosed, and that the same is reasonably worth $110,000; the affidavit of James J. Carroll, stating that he had been engaged in the real estate business, and in making loans and managing property for more than twenty-five years, that he is familiar with the real estate in question, and that the same is reasonably worth $110,000.

Upon this state of the pleadings the court, on October 4, 1935, appointed a receiver of the premises, the order of appointment finding that the real estate is improved with twenty-one apartments and seven stores; that its value does not exceed $40,000,

The previous $[illegible]$ mortgage upon which, amounting to $[illegible]$, is utilized towards the new expenditure which merits with the Dorchester Trust Company, on act thereto, on October of $[illegible]$, amounting to $[illegible]$. Since the years $[illegible]$ and $[illegible]$, some $[illegible]$ paid out of the monies deposited with the Dorchester Trust Company. Since the years $[illegible]$ and $[illegible]$, by which adjustments were filed and are pending and outstanding of in the county court, are unpaid. There is now on deposit with the Dorchester Trust Company, and available for the payment of items, the sum of $[illegible]$ and a liberty bond for the sum of $[illegible]$.

The complaint alleges that the premises, the value of which is alleged does not exceed $[illegible]$, are owner occupied for the habitations exclusive by the trust fund. Claim 1. Part's proofs answer avers that he has been engaged in the real estate business for more than twenty years, and that the initiation is worth at least $[illegible]$. To support the answer defendants filed the affidavit of James G. Dryenger, showing such he has been engaged in the real estate business for more than twenty years, in familiar with the property being foreclosed, and that the same is reasonably worth $[illegible]$. The affidavit of James G. Darrell, showing also he has been engaged in the real estate business, and in making loans and monitoring property for more than twenty-five years, that he is familiar with the real estate in question, and that the same is reasonably worth $[illegible]$.

Upon this state of the pleadings the court, on October 4, 1928, appointed a receiver of the premises, the order of appointment filedng that the real estate is improved with twenty-one apartments and never exceeds that the value does not exceed $[illegible]$,

and that the property is scant security for the indebtedness secured by the trust deed. October 8, 1935, the court entered an order directing Orr to turn over to the receiver all rents collected subsequent to September 30, 1935, as well as all leases upon said premises, and to surrender possession thereof to the receiver.

It is urged as grounds for reversal that plaintiff has not sustained the burden imposed by the authorities upon the applicant for the appointment of a receiver to present facts by verified complaint, petition or by evidence showing the necessity for the appointment. Defendants say that plaintiff took the position before the chancellor that the rents, issues and profits being pledged as security, it was mandatory for the court, upon the request of the plaintiff, to appoint a receiver. We held in Frank v. Siegel, 263 Ill. App. 316, in an opinion concurred in by all the justices of the appellate court, save one, that the pledge of the rents in a trust deed is not conclusive upon the chancellor, and that while it is entitled to weight, all the equities of the case should be considered, and that it would be contrary to the nature of a court of equity to enforce the exact letter of the contract of mortgage regardless of the necessities or equities involved. Bagley v. Illinois Tr. & Svgs Bank, 199 Ill. 76, is to the same effect.

It appears from the record that after the execution of the extension agreement Orr managed the property under a penal bond in the sum of $3,000, conditioned on the faithful discharge of his duty, and that the net rents were deposited each month with the Northern Trust Company and interest paid to plaintiff in accordance with the agreement of the parties. There is no complaint that Orr did not manage the property efficiently, or that he failed to faithfully account for all of the rents collected. The extension agreement provides that the

and that the property is owned exclusively by the indebtedness secured by the trust deed. October 3, 1928, the owners executed an order directing the trustee over to the receiver all trust emoluments subsequent to September 30, 1928, as well as all income upon said premises, and is entitled possession thereof in the receiver.

It is wrong to permit for irrevocable this judicial act and sustained the burden imposed by the authorities upon the moving for the appointment of a receiver to present facts by verified complaint, petition or by affidavit showing the necessity for the appointment. Petitioner not that plaintiff took the position before the chancellor that it owns, issues and profits being pledged as security, it was authority for the court, upon the request of the plaintiff, to appoint a receiver. It held in Trust v. Finnegan, 329 Ill. App. 514, in an opinion concurred in by all the justices of the appellate court, over one, that the pledge of the rents in a trust deed is not considered upon the mortgagor, and that while it is material to weight, all the opinion of the case should be considered, and that it would be contrary to the nature of a court of equity to enforce the trust Lessee of the contract or mortgage requirement of the assignility or equitable instead. Bunker v. Illinois Tr. & Sav. Bank, 329 Ill. 76, is to the same effect.

It appears from the record that after the execution of the attorneys agreement for receiver the property which a pecuniary in a sum of $5,000, conditioned on the faithful discharge of his duty, and that the net rents were deposited each month with the Harrison Trust Company and thereon paid to plaintiff in accordance with the agreement of the parties. There is no complaint that our did not manage the property efficiently, or that he failed to faithfully perform for all of the years utility. The undersigned agreement provides that the

Orrs should continue in the management of the building until October 20, 1935. The receiver was appointed before the expiration of that time, and no showing is made as to the necessity of immediately appointing a receiver and changing the management contrary to the agreement of the parties.

Defendants call our attention to the affidavit attached to the complaint. The abstract of record shows that this affidavit was evidently prepared for execution by Thilde L. Sonnenberg, the plaintiff. Originally it read as follows:

> "Thilde L. Sonnenberg, being first duly sworn on oath deposes and says that she is the plaintiff in the above entitled cause, and that she has read the above and foregoing complaint and that all of the matters and allegations contained in said complaint are true, in substance and in fact, except as to those matters which are stated upon information or belief, and as to those matters plaintiff believes them to be true."

The name, Thilde L. Sonnenberg, was crossed out from the affidavit and the name of Edward Blackman, one of plaintiff's counsel, inserted. It was then signed by Blackman. It thus appears that Blackman purports to swear to facts indicating that plaintiff read the complaint and all the matters and allegations contained therein, and that "plaintiff believes them to be true." There is nothing in the affidavit to indicate that Blackman read the affidavit or that he purports to have any knowledge whatsoever of the facts contained in the complaint; nor does he even swear that he believes the facts to be true. At best, it simply states that the plaintiff, Thilde L. Sonnenberg, believes them to be true, but she does not swear to the allegations of the complaint. Affidavits of this character have been condemned by the Supreme Court in Christian Hospital v. People, 223 Ill. 244, and by this court in Grabowski v. MacLaskey, 257 Ill. App. 484, and Sherman Park Bank v. Loop Office, 238 Ill. App. 450.

The rule is well settled that a receiver cannot be appointed upon an unsworn bill. (Daley v. Nelson, 119 Ill. App. 627.) In the view that we take, the foregoing affidavit is of no effect, and there-

there should overlook in the management of the building until October 31, 1966. The vendor was acquainted before the expiration of that time, and he showing is true or to the necessity of immediately rejecting a system and changing the management contract by the expression of the position.

Defendants call our attention to the affidavit attached to the complaint. The contents of report upon that this affidavit was wrongfully prepared for execution by Thelma L. Pennington, the plaintiff. Originally it read as follows:

"Thelma L. Pennington, being first duly sworn on oath, states and says that she is the plaintiff in the above entitled cause, and that she has read the above and foregoing complaint and that all of the matters and allegations contained in said complaint are true, to matters and to her knowledge, except as to those matters which are stated upon information or belief, and as to those matters plaintiff believes them to be true."

The name, Thelma L. Pennington, was crossed out from the affidavit and the name of Donald Blackman, one of plaintiff's counsel, inserted. It was then signed by Blackman. It does appear that Blackman purpose to assert in fact instead that plaintiff read the complaint and all the matters and allegations contained therein, and that "plaintiff believes them to be true." There is nothing in the affidavit to indicate that Blackman read the affidavit or that he purported to have any knowledge whatsoever of the facts contained in the complaint; nor does he even assert that he believes the facts to be true. At best, it simply shows that the plaintiff, Thelma L. Pennington, believes them to be true, but she does not swear to the allegations of the complaint. Affidavits of this character have been condemned by the Supreme Court in Christian Herald v. Tombs, 216 Ill. 264, and by this court in Schwartz v. Schwartz, 287 Ill. App. 484, and Chatham Park Bank v. Jane Clifton, 238 Ill. App. 490.

The rule is well settled that a pleading cannot be supported upon an unsworn bill. (Baker v. Adams, 126 Ill. App. 447.) In the case that we have, the affidavit is of no effect, and therefore

fore the material allegation in the complaint, fixing the value of the property at $40,000, which under a properly verified complaint would be the only basis alleged for justifying the appointment of a receiver, cannot be given much weight against the verified answer of defendants and their supporting affidavits showing the property to be worth $100,000, or more.

Plaintiff's counsel evidently realized that the affidavit was defective because after defendants had filed their abstract and briefs in the appellate court, plaintiff made a motion suggesting the diminution of the record, which was allowed, and a supplemental transcript of record was then filed, showing an amended affidavit by Edward Blackman, which the chancellor permitted him to file on November 14, 1935, more than a month after the order appointing a receiver had been entered. October 14, ten days after the receiver was appointed, defendants filed an appeal bond with the clerk of the circuit court, and on the same day served notice of appeal on plaintiff's attorneys, as required by the statute and rules of the court. Also on the same day a praecipe for record was filed with the clerk of the circuit court, and a notice thereof was served on plaintiff's counsel. This praecipe includes all papers filed in the case and all orders entered, other than summons, at the date of the perfecting of the appeal. Plaintiff's counsel made no objection thereto, nor did they file any additional praecipe, as required by statute. The rule is well settled that the person in whose favor a judgment is entered cannot, after an appeal is taken and perfected, present new and additional evidence in the trial court to support the judgment and avail himself of the additional evidence in the appellate court to sustain the judgment. In the case of Ogden v. Town of Lake View, 121 Ill. 422, our Supreme court said: (p. 425)

"To permit the amendment to be made afterwards, was simply to permit the making of a new record. This, of course, cannot be

that the non-rent allegation in the complaint, liberal the value of the property is $10,000, which under a directly applicable statute would be the only basis allowed for justifying the appointment of a receiver, cannot be given much weight against the positive manner of defendants and their supporting affidavits showing the property is be worth $100,000, or more.

Plaintiff's counsel evidently realized that the affidavit was defective because after defendants had filed their answer admitting and briefs in the appellate court, plaintiff made a motion requesting the dismissal of the receiver, which was allowed, and a supplemental transcript of record was then filed, showing an amended affidavit by Edward Jackson, which the chancellor permitted him to file on November 21, 1919, more than a month after the writ appointing a receiver had been endorsed. November 14, two days after the receiver was appointed, defendants filed an appeal bond with the clerk of the circuit court, and on the same day served notice of appeal on plaintiff's attorneys, as required by the statute and rules of the court. Also on the same day a praecipe for a record was filed with the clerk of the circuit court, and a notice thereof was served on plaintiff's counsel. This praecipe included all papers filed in the case and all orders entered, other than summons, up to the date of the perfecting of the appeal. Plaintiff's counsel made no objection thereto, nor did they file any additional praecipe, as required by statute. The rule is well settled that the person in whose favor a judgment is entered cannot, after an appeal is taken and perfected, present new and additional evidence in the trial court to support the judgment and avail himself of the additional evidence in the appellate court to sustain the judgment. In the case of Dunne v. Town of Lake View, 2 Ill. App. 482, our supreme court said: (p. 482)

"To permit the amendment to be made afterwards, was simply to permit the making of a new record. This, of course, cannot be

permitted. While, within certain limitations, a record, even after error brought, may, upon proper notice, be so amended as to make it truly state what actually occurred in court, and which should have been entered of record at the time, yet it cannot be amended for the purpose of interpolating into it matters which did not actually take place."

In Stirlen v. Neustadt, 80 Ill. App. 378, an injunction was granted. After an appeal was perfected and the question of the sufficiency of the affidavit was raised, appellee endeavored to cure same by filing an amended bill to which a proper affidavit was attached. In discussing the question, the appellate court said: (p. 380)

"The appellee has undertaken to cure the defect by filing in the Superior Court, by leave of that court, an amended bill properly verified, nunc pro tunc, as of a date prior to the perfecting of the appeal to this court; and has moved this court for leave to file here an additional record showing that order and said amended bill. The defect cannot be remedied in that way; the order appealed from must stand or fall according to the record as it was when the appeal was perfected."

To the same effect, Bauer v. Lindgren, 279 Ill. App. 397, 406.

So in this proceeding, the order appointing the receiver must stand or fall according to the record as it was when the appeal was perfected. The record then contained a defective affidavit and the court was not justified in appointing a receiver in view of the showing made by defendants as to the value of the security, in their verified answer and the affidavits filed in support thereof.

During the pendency of this appeal several motions were made on December 6, 1935. Plaintiff moved for leave to file a supplemental abstract instanter to supply the amended affidavit filed after the appeal was perfected and certain proceedings had before the court. This motion will be denied. Defendant moved to strike the supplemental record filed by appellee, also containing the amended affidavit and proceedings had before the court. The motion will be allowed. Defendants also moved to strike the affidavit of Edward Blackman, filed in the trial court November 13, 1935, which was incorporated in the supplemental record filed by plaintiff, and to strike that part of

[illegible] [illegible] [illegible] [

the supplemental record which purports to be a report of proceedings had on November 14, 1935. Both of these motions will be allowed.

For the reasons stated herein, the order of the circuit court appointing a receiver will be reversed.

REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

37954

ARCHIE SCHIMBERG and S. H. ALSTER,
copartners doing business as
FRIEDMAN, SCHIMBERG & ALSTER,
Appellees,

v.

MERCHANDISE BANK AND TRUST COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

283 I.A. 636

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a fourth class contract action in the municipal court by plaintiffs, Archie Schimberg and S. H. Alster, doing business as Friedman, Schimberg & Alster, who were the payees of a check for $225, against the drawee thereof, the Merchandise Bank and Trust Company, defendant, for the latter's refusal to certify the check. The case was tried by the court without a jury and the issues found and judgment entered against defendant for $225. This appeal followed.

Plaintiffs' statement of claim alleges that defendant promised to pay them the amount of the check in question; that the Baird Lock Company (hereinafter sometimes referred to as the Lock Company), the drawer of the check, issued it to them and they, by one N. M. Vikeland, thereupon presented it to defendant for payment; that the Lock Company then and there asked defendant bank to certify and prefer the payment of said check over other checks; that the bank requested plaintiffs to leave the check with it and as soon as funds of the Lock Company were collected it would certify the check and mail it to plaintiffs; and that funds sufficient to pay the check were collected, but that the bank, disregarding the instructions of the Lock Company, paid other checks.

This is a fourth class contract action in the municipal court by plaintiffs, Arthur Rothberg and E. M. Alder, doing business as Triangle, Rothberg & Alder, who were the payees of a check for $200, against the drawee thereof, the Merchandise Bank and Trust Company, defendant, for the latter's refusal to satisfy the check. The case was tried by the court without a jury and the issues found and judgment entered against defendant for $200. This appeal follows.

Plaintiffs' statement of claim alleges that defendant promised to pay them the amount of the check in question; that the Bond Lock Company (hereinafter sometimes referred to as the Lock Company), the drawer of the check, issued it to them and they, by one E. Lindland, thereupon presented it to defendant for payment; that the Lock Company then and there asked defendant bank to certify and guarantee the payment of said check over which act; that the bank represented plaintiffs to leave the check with it and as soon as funds of the Lock Company were collected it would certify the check and pay it to plaintiffs; and that their sufficient to pay the check were collected, but that the bank, disregarding the instructions of the Lock Company, paid other checks.

Defendant's affidavit of merits denies that H. M. Wikeland was the agent of plaintiffs and that the check was ever presented to it by plaintiffs. It avers that the Lock Company, the drawer, by its agent, Wikeland, presented the check to be certified and that at the time of presentation the Lock Company was advised that it had insufficient funds in the bank to justify the certification of said check; that there were numerous other checks being presented for payment or certification and that the majority of them were being refused; that the Lock Company at that time advised the bank that it was in financial difficulties, that a petition was being filed in bankruptcy and that a receiver would soon be appointed for it; and that the bank then informed the Lock Company that it would not give preference to any check unless payment was stopped on all other checks. The affidavit of merits also denies that defendant agreed to take possession of the check and avers that the bank informed the Lock Company that it could not keep the check in its possession.

Defendant contends that it is not liable to plaintiffs, the holders and payees of the check, since the check did not operate as an assignment of the account or any part of it and the bank did not accept or certify it in writing; that the check was not presented for payment, but was presented by the drawer to be certified, and defendant was justified in its refusal to accept it; and that, even though it did wrongfully refuse to accept a check presented by a holder or payee, it would be liable only to the drawer.

Plaintiffs' theory is that there were sufficient funds of the drawer in the hands of the bank when the check was presented for certification and that it was the duty of the bank to certify same on the demand of the holder or holders, this duty not having been modified by the Negotiable Instruments Act; that the contract between the

Defendant's affidavit of merits denies that H. M. Wickstrand was the agent of plaintiffs and that he made the check the property in it by plaintiffs. It states that the Look Company, the drawer, by its agent, Wickstrand, presented the check to be certified and that at the time of presentation the Look Company was advised that it had insufficient funds in the bank to justify the certification of said check; that there were numerous other checks being presented for payment or certification and that the majority of them were being returned; that the Look Company at that time advised the bank that it was in financial difficulties, that a petition was being filed in bankruptcy and that a receiver would soon be appointed for it; and that the bank then informed the Look Company that it would not give preference to any check unless payment was stopped on all other checks. The affidavit of merits also denies that defendant agreed to take possession of the check and avers that the bank informed the Look Company that it would not keep the check in its possession.

Defendant contends that it is not liable to plaintiffs, the holders and payees of the check, since the check did not operate as an assignment of the account or any part of it and the bank did not accept or certify it in writing; that the check was not presented for payment, but was presented by the drawer to be certified, and defendant was justified in its refusal to accept it; and that, even though it did wrongfully refuse to accept a check presented by a holder or payee, it would be liable only to the drawer.

Plaintiffs' theory is that there were sufficient funds of the drawer in the hands of the bank when the check was presented for certification and that it was the duty of the bank to certify same on the demand of the holder or holders, this duty not having been modified by the Negotiable Instruments Act; that the contract between the

depositor and the bank imposed on the bank the duty to the holder of a check as well as to the depositor to certify the drawer's check to the extent of its deposit; that a bank is under the duty of honoring its depositors' checks in the order of their presentation and not in the order of their issuance; and that the breach of this duty constituted an illegal preference, for which the bank is liable to the holder for any loss thereby sustained.

The drawer of the check involved, the Baird Lock Company, was in financial difficulties and its president, one Carlson, and H. W. Wikeland, one of its employees, went to the office of the plaintiff attorneys on April 17, 1933, at which time Carlson as president of the Lock Company drew the check to the order of plaintiffs for $225. It is reasonable to infer that plaintiffs were advised, to some extent at least, as to the precarious nature of the Lock Company's bank account, because they did not accept and deposit the check in their own bank account or present same to the drawee bank for payment. Instead Wikeland went to defendant bank on the same day the check was drawn and presented it in an attempt to have it certified. Its certification was refused on the ground that, while the drawer's account indicated a credit balance of more than sufficient to cover the amount of the check, such balance represented checks recently deposited by the Lock Company which were still in the process of collection. Where checks have been deposited and it cannot at the time be determined whether or not they will be paid, the bank is not required to accept checks issued against the account until it can be determined in the regular course whether or not checks deposited will be paid. (National Produce Bank of Chicago v. Dodds et al., 205 Ill. App. 444.)

After the repeated refusals of the bank to certify the check on April 17, 1933, Wikeland left the check at the bank. The evidence is in sharp conflict as to the circumstances under which he left it,

depositor and the bank drawee, as the case may be the holder of a check as well as to the drawer to certify the drawer's check to the amount of the deposit; that a bank is under the duty of honoring the depositor's check in the order of their presentation and not in the order of their execution; and that the drawee is under no duty concerning or liaison predecessor, for which the bank is liable to the holder for any loss thereby sustained.

The drawer of the check involved, the Dwight Lock Company, was in financial difficulties and its president, one Dwight, and W. T. Vikland, one of its employees, went to the office of the plaintiff attorneys on April 17, 1928, at which time Dwight as president of the Lock Company drew the check in the order of plaintiff for $285. It is reasonable to infer that plaintiff were advised, to some extent at least, as to the precarious nature of the Lock Company's bank accounts, because they did not accept and deposit the check in their own bank account or present same to the drawee bank for payment. Instead Vikland went to defendant bank on the same day the check was drawn and presented it in an attempt to have it certified. The certification was refused on the ground that, while the drawer's account exhibited a credit balance of more than sufficient to cover the amount of the check, such balance represented checks recently deposited by the Lock Company which were still in the process of collection. Where checks have been deposited and it cannot at the time be determined whether or not they will be paid, the bank is not required to credit drawer immediately the account until it can be determined in the regular course whether or not checks deposited will be paid. (National Produce Bank of Chicago v. Dodge et al., 208 Ill. App. 444.)

After the refusal refusals of the bank to certify the check on April 17, 1928, Vikland left the check at the bank. The evidence is in sharp conflict as to the circumstances under which he left it,

as well as to the tenor of the conversations between him and Garfield Thompson, an officer, and Orin D. Miller, an employee of the bank, that preceded his leaving it.

Notwithstanding that plaintiffs successfully injected other issues into this case in the trial court and attempt to do so here, the real question presented, and the only one necessary to be determined, is whether or not defendant is liable in the absence of its written acceptance or certification of the check. It is agreed that since the enactment of the Negotiable Instruments Act in 1907 a check no longer operates automatically as an assignment pro tanto of the depositor's funds on deposit in a bank, and it must be conceded under the evidence that, when plaintiffs' check was presented to defendant for certification, the bank was justified in refusing to certify it because of the condition of the Lock Company's account.

It was obviously to avoid contentions such as those made here that the sections hereinafter set forth were included in the Negotiable Instruments Act. The requirement that the acceptance of a check or its certification must be in writing and signed by the drawee was intended to prevent any inference of an acceptance or certification from conduct and loose words differently remembered or detailed by different witnesses. (Whitewater Commercial & Savings Bank v. United State Bank of Crystal Lake, 224 Ill. App. 26.)

The Negotiable Instruments Act (Ill. State Bar Statutes, 1935, ch. 98) contains the following applicable provisions:

"Par. 210, Sec. 138: A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

"Par. 206, Sec. 134: A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

"Par. 153, Sec. 131: The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

as well as to the issue of the conversations between him and Bertrand Thompson, an officer, and Orin B. Miller, an employee of the bank, that proceeded his leaving it.

Notwithstanding that plaintiffs unnecessarily injected other issues into this case in the trial court and attempt to do so here, the real question presented, and the only one necessary to be determined, is whether or not defendant is liable in the absence of its written acceptance or certification of the check. It is agreed that since the enactment of the Negotiable Instruments Act in 1907 a check no longer operates automatically as an assignment pro tanto of the depositor's funds on deposit in a bank, and it must be assumed under the evidence that, when plaintiffs' check was presented to defendant for certification, the bank was justified in refusing to certify it because of the condition of the Lack Company's account.

It was obviously to avoid conditions such as those made here that the sections heretofore set forth were included in the Negotiable Instruments Act. The requirements that the acceptance of a check or its certification must be in writing and signed by the drawee was intended to prevent any inference of an acceptance or certification from doubtful and loose words differently construed or affected by different witnesses. (Mercantile Commercial & Savings Bank v. United States Bank of Crystal Lake, 284 Ill. App. 26.)

The Negotiable Instruments Act (Ill. Stats Ann. Stevens, 1935, ch. 98) contains the following applicable provisions:

"Sec. 123. Sec. 1324. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, before and until it accepts or certifies the check.

"Sec. 125. Sec. 1326: A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

"Sec. 126. Sec. 1327: The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

In Guquet Jewelry Co. v. National Builders Bank, 263 Ill. App. 611, where a check was drawn on defendant bank to the order of plaintiff, who properly indorsed it and presented it for payment at the bank which had on deposit funds of the drawer sufficient to pay the check and the bank refused to pay it, in an opinion written by Justice Friend, this court said at pp. 613, 614:

"Since the enactment of the Negotiable Instruments Act, this court has had occasion to pass on a similar question in the case of Chicago, B. & Q. R. Co. v. Merchant's National Bank, 203 Ill. App. 561. In that case the appeal was taken from a decision sustaining a demurrer to a declaration, alleging in substance the issuance of a check to the plaintiff, the presentation thereof to the defendant, and its refusal to pay, accept or certify, although sufficient funds were on hand belonging to the drawer at the time of presentation. The court, after discussing the former decisions of our courts, adopted the statement contained in an opinion in Rauch v. The Bankers National Bank of Chicago, 143 Ill. App. 625, as a correct statement of the law now in force in this State, and said:

"'By the law of Illinois as it exists today (since the passage of the Negotiable Instruments Act of June 5, 1907), a bank is not liable in any case to the holder of a check drawn on it "unless and until it accepts or certifies" the same. This conforms to the law as it before existed in most jurisdictions, but in Illinois before the passage of the act in question * * * a different doctrine prevailed.' The court concluded that no liability was shown, and that the demurrer was properly sustained."

Discussing a similar question where there was no written certification of a check, in Whitewater Commercial & Savings Bank v. United State Bank of Crystal Lake, supra, the court said at pp. 31,32:

"* * * But by the Negotiable Instruments Law, in force July 1, 1907, this State was placed more in accord with the commercial law of other States. Section 188 thereof (Cahill's Ill. St. ch. 98, par. 210) provides that a check does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. This check was never certified. Section 184 (Cahill's Ill. St. ch. 98, par. 206) declares a check to be a bill of exchange and makes the provisions of the Act applicable to a bill of exchange payable on demand also applicable to a check. Section 131 (Cahill's Ill. St. ch. 98, par. 153) says the acceptance of a bill 'must be in writing and signed by the drawee.' This check was not accepted in writing. We cannot agree with plaintiff's argument that there can be an implied acceptance of a check."

The check involved here was never presented for payment by plaintiffs and when it was presented by Vikeland, an employee of the drawer, to be certified the bank was clearly justified in refusing to certify it. Even though plaintiffs presented the check for acceptance

In Bank of Pratt City, v. Insurance Company, 161 Ill. App. 112, where a check was taken on a bank of plaintiff, who supposed it lacked it and protested it for payment as the bank which had on deposit funds of the drawer sufficient to pay the amount the bank refused to pay it, in an action brought by Justice Brisco, this court held at pp. 113, 114:

"Since the amendment of the negotiable instruments act, this court has not decided by a majority opinion in the case of Gilmore, 1 A. & E. Ann. Cas. 1, Goodwin's Central Law Journal, 1903, 1 Ill. App. 1. In that case the court was dealing with a defendant maintaining a discount in a delaware, allowing it upon the issuance of a check to the plaintiff, the proceeds thereof to be used elsewhere, and the defendant to pay, upon presentation, sufficient funds were to have been deposited to the credit of the drawer sufficient to pay the check. The plaintiff presented the check for payment, and the bank refused to pay it, and the court held that the defendant was not liable to the plaintiff, because the check was never certified. Justice Ibe (Gentil's Ill. 2d ed. p. 1, 2) interprets a check to be a bill of exchange and makes the provisions of the act applicable to a bill of exchange and makes the provisions of the act applicable to a check. Further Ibe (Gentil's Ill. 2d ed. p. 1, 2) says the delivery of a bill 'must be in writing and signed by the drawer.' This check was not accepted in writing. We cannot agree with plaintiff's argument that there can be an implied acceptance of a check."

The court further was asked to instruct for payment by plaintiff and when it was prevented by illness, on measure of the issues, to be satisfied the bank was justifiably induced to believe certify it. Even though plaintiff presented the check for payment

or certification and the bank wrongfully refused to accept or certify it, we think that the bank would be liable only to the drawer of the check and that the holders' remedy when acceptance or certification is unjustifiably refused by the drawee is against the drawer.

Other points have been urged and considered, but in the view we take of this cause we deem it unnecessary to discuss them.

The language of the Negotiable Instruments Act is clear and unmistakable that "a bank is not liable to the holder unless and until it accepts or certifies the check" in writing, and, inasmuch as the check in question was not certified by the defendant in writing, the judgment of the municipal court must be reversed and judgment entered here in favor of defendant and against plaintiffs.

JUDGMENT HERE FOR DEFENDANT
AND AGAINST PLAINTIFFS.

Scanlan, P. J., and Friend, J., concur.

of certification and the bank - quantity (ratio) to assay or certify it, we find that the bank would be liable only to the drawer of the cheque and that the indirect remedy than acceptance or certification is satisfactorily afforded by the drawee in against the drawer.

Other points have been urged and considered, but in the view we take of this case we find it unnecessary to discuss them.

The language of the negotiable instruments act is clear and unambiguous that "a bank is not liable to the holder unless and until it accepts or certifies the cheque in writing, and, however be the views in question not stipulated by the statutes in writing, the judgment of the municipal court was in accordance and judgment entered such in favor of defendant and against plaintiff.

Affirmed.

Dunbar, J. (by ass. trial J.), concurs.

42 4

38072

JOHN CROFT,
Defendant in Error,

v.

HARRY P. PEARSONS, H. P. PEARSONS as trustee, and COMMERCIAL TRUST & SAVINGS BANK, a corporation, as trustee,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

283 I.A. 636[3]

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

John Croft, plaintiff in this cause, John W. Dobbins and Presley L. Neville, were farm laborers employed by defendant Harry P. Pearsons. All three brought individual actions before a justice of the peace against Pearsons, individually and as trustee, and the Commercial Trust & Savings Bank as trustee, for a balance of wages claimed to be due each of them, and recovered judgments against the three defendants, said judgments being appealed to the circuit court, where the three cases were consolidated for trial. They were tried by the court without a jury, the issues found against the three defendants, and January 25, 1933, judgments were rendered against the three defendants in favor of Croft for $440, in favor of Dobbins for $550 and in favor of Neville for $472. The judgment order in the instant case read in part: "The defendants having entered their exceptions herein, pray an appeal * * * which is allowed * * * and sixty days from this date is hereby allowed the defendants to file their bill of exceptions." No appeal was ever perfected. October 4, 1933, on plaintiff's motion, the trial court entered an order correcting the judgment of January 25, 1933, to show that it was rendered only against Harry P. Pearsons, individually,

[illegible]

JOHN G. DOTY,
Defendant in error.

v.

HENRY A. WOLLMAN, H. S. Pope, Jr.
as trustee, and [illegible]
& BRIAN BIRD, a corporation, as
trustee,
Plaintiffs in error.

Error to [illegible]
County, [illegible] County.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

John Doty, plaintiff in this cause, John A. Wollman and Henry A. Pope, Jr., as trustee, were then interested as [illegible] of the power against Trustees, individually but as trustee, and the Commercial Trust & Savings Bank as trustee, for a balance of wages claimed to be due each of them, and recovered judgments in the three d-foundrie, with judgments being appealed to the circuit court, where the three cases were consolidated for trial. They were tried by the court without a jury, the issues found against the three defendants, and January 26, 1922, judgments were rendered against the three defendants in favor of Doty for $440, in favor of Wollman for $200 and in favor of Wallin for $472. The judgment order in the instant case read in part: "The defendants having entered their exceptions herein, pray an appeal * * * which is allowed * * * and sixty days from this date is hereby allowed the defendants to file their bill of exceptions." No appeal was ever perfected. October 1, 1922, on plaintiff's motion, the trial court entered an order correcting the judgment of January 26, 1922, to show that it was prosecuted only against Henry A. Trustee, individually,

and "no evidence having been adduced against the defendants Harry P. Pearsons, as trustee, and the Commercial Trust & Savings Bank, a corporation, as trustee," the court found said last named defendants "not guilty and said cause is hereby dismissed as to them." The three defendants by this writ of error seek to reverse the order of October 4, 1933, correcting the judgment of January 25, 1933, and also to reverse the judgment of January 25, 1933. This case has been consolidated for hearing in this court with case No. 38073 and case No. 38074.

Defendants contend that, after the expiration of the term at which the judgment of January 25, 1933, was entered, the trial judge could not amend the record of the judgment, either from his supposed personal recollection of what had occurred at the trial or from anything appearing in the original bill of exceptions, which was settled and filed after the expiration of the judgment term; that there was admittedly no evidence adduced at the trial to support a judgment against any of the defendants other than Harry P. Pearsons, personally; and that the judgment of January 25, 1933, being a unit as to the three defendants, must be reversed as to all, if reversible as to one or more of them.

Plaintiff's theory is that the judgment of January 25, 1933, was erroneously entered through misprision of the clerk of the trial court inasmuch as said judgment order purported to enter judgment against all the defendants, whereas the court ordered judgment entered only against Pearsons, individually; as clearly appears from the "purported bill of exceptions of March 24, 1933," contained in the record filed in this court; that in the light of matters contained in such bill of exceptions the trial court had the authority to correct the judgment order of January 25, 1933, to speak the truth, even after term time; that, in any event, plaintiff's motion hereto-

and "no evidence having been adduced against the defendants Harry F. Sinclair, as trustee, and the Continental Trust & Savings Bank, a corporation, as trustee," the court then and there said and entered "not guilty and will cause in hereby discharged as to them."

The three defendants by writ of error sought to reverse the order of October 4, 1927, correcting the judgment of January 30, 1926, and also to reverse the judgment of January 28, 1926. This case has been consolidated for hearing in this court with case No. 26270 and case No. 26272.

Defendants contend that, after the expiration of the term at which the judgment of January 28, 1926, was entered, the trial judge could not amend the record of the judgment, either from his own personal recollection of what had occurred at the trial or from affidavits appearing in the original bill of exceptions, which was settled and filed after the expiration of the judgment term; that there was absolutely no evidence adduced at the trial to support a judgment against any of the defendants other than Harry F. Sinclair. Incidentally our decision that the judgment of January 28, 1926, being a nullity as to the defendants, must be reversed as to all, is reversible as to one or more of them.

Plaintiff's theory is that the judgment of January 28, 1926, was erroneously entered through misprision of the clerk of the trial court because on his judgment entry he noted judgment against all the defendants, whereas the court entered judgment entered only against Harry F. Sinclair, as clearly appears from the "Entered bill of exceptions of March 24, 1926," contained in the record filed in this court; that in the light of matters contained in such bill of exceptions the trial court had the authority to correct the judgment entry of January 28, 1926, to speak the truth, even after term time; in any event, plaintiff's motion during-

fore made and reserved to hearing to strike from the record defendants' bill of exceptions should be sustained because it was not presented to and signed by the trial judge within the time fixed by the order of the court; and that in the absence of a proper bill of exceptions it must be assumed that there was sufficient evidence presented in the trial court to support the judgment against all the defendants.

While it appears conclusively from an examination of the bill of exceptions contained in the record that the court intended and the parties understood that the judgment was to be entered only against Pearsons, individually, that fact furnished no legal warrant for the entry of the order of October 4, 1933, amending and correcting the judgment order of January 25, 1933, to show a judgment only against Pearsons, personally. The order itself is silent as to what, if any, legal sanction it was predicated upon. It has repeatedly been held that an order attempting to amend, alter or correct a judgment order entered after the expiration of the original judgment term and based solely upon the personal recollection of the trial judge and a bill of exceptions covering the trial, which was settled after the judgment term, is erroneous, if not actually void. (McCord v. Briggs & Turvias, 338 Ill. 158; Lesley Hospital v. Strong, 333 Ill. 153.)

In the Lesley Hospital case, the court said, at p. 159:

"The fact that a particular order has been made by the court at a previous term, if it is not of record, can only be shown 'by the production of some note or memorandum from the records or quasi records of the court, or by the judge's minutes, or some entry in some book required to be kept by law, or in the papers on file in the cause. It cannot be determined from the memory of witnesses or by the recollection of the judge himself.' Tynan v. Weinhard, 153 Ill. 598; Gebbie v. Mooney, 121 id. 255; People v. Anthony, 129 id. 218; Chicago, Milwaukee and St. Paul Railway Co. v. Walsh, 150 id. 607; Culver v. Cougle, 165 id. 417; Tosetti Brewing Co. v. Koehler, 200 id. 369."

It was also held in that case, on the same page:

"It is manifest that a note or memorandum which would authorize

fore made our reserved to hearing to revise from the record defendants' bill of exceptions should be sustained because it was not presented to and signed by the trial judge within the time fixed by the order of the court; and that in the absence of a proper bill of exceptions it must be assumed that there was sufficient evidence presented in the trial court to support the judgment against all the defendants.

While it appears conclusively from an examination of the bill of exceptions presented in the record that the court indicated and the parties understood that the judgment was to be entered only against Peterson, individually, that fact terminated or legal effect for the entry of the order of October 4, 1920, nunc pro tunc correcting the judgment order of January 13, 1920, to show a judgment only against Peterson, personally. The order itself is clear on its face, if any legal question is now presented upon. It has repeatedly been held that no other showing is needed, after or without a judgment order entered after the exposition of the original judgment term and based solely upon the personal recollection of the trial judge and a bill of exceptions covering the trial, which was settled after the judgment term, is erroneous, if not actually void. (Bedford v. Phillips & Jordan, 108 Ill. 1; Cooley Complaint v. Clement, 193 Ill. 321.)

In the Cooley Complaint case, the court said, at p. 325:

"The fact that a particular order has been made by the court at a previous term, if it is not of record, can only be shown by the production of some note or memorandum from the records or court records of the court, or by the judge's minutes, or some entry in some book required to be kept by law, or in the judge's minutes in the case. It cannot be determined from the memory of witnesses or by the recollection of the judge himself." (Cooley v. Kimbrough, 110 Ill. 328; Phillips v. Bowen, 193 Ill. 1; Cooley v. Kimbrough, 110 Ill. 328; [illegible] v. [illegible], 110 Ill. 328; [illegible] v. [illegible], 110 Ill. 328; [illegible] v. [illegible], 110 Ill. 328; [illegible] v. [illegible], 110 Ill. 328.)

It was also held in that case, on the same page:

"It is manifest that a note or memorandum which would authorize

the amendment of the record made at a previous term must be a note or memorandum which was made during that term, otherwise the rule would amount to nothing. For this reason the recitals in the appeal bond and the bill of exceptions are without significance."

The order of October 4, 1933, attempting to correct the judgment order having been erroneously entered, can the original judgment against the three defendants herein be sustained by the record before us? It is conceded that there was no evidence presented at the trial to support a judgment against any of the defendants except Pearsons, individually. If the judgment is reversible as to Pearsons as trustee, and the Commercial Trust & Savings Bank as trustee, can it stand as to Pearsons, individually? A judgment is a unit as to all the defendants against whom it has been rendered and cannot be reversed as to one or more of them and affirmed as to the others, but if erroneous as to one it is erroneous as to all. (Seymour v. Richardson Fueling Co., 305 Ill. 77, and authorities cited therein.) While a different rule may have been enunciated under the provisions of the Civil Practice Act since it became effective, this cause was tried prior to January 1, 1934, and must necessarily be governed by the rule above set forth.

Plaintiff made a motion April 15, 1935, which was reserved to hearing, to strike the bill of exceptions from the files because (1) it was not settled and signed by the trial judge before it was filed March 24, 1933; (2) it was not settled and signed by the trial judge until September 29, 1933, more than six months after the time fixed by the court for its filing and without the time for the signing thereof having been extended; (3) it purports to have been presented to a judge other than the trial judge on March 24, 1933, without showing due diligence on defendants' part in seeking to present the bill to the trial judge; and (4) the trial judge did not certify that the purported bill of exceptions contained all the evidence introduced at the trial of this cause.

the manifest of the proper case of a practice that may be a mere or unnecessary risk on such matter. THAT IMPLIES, especially the risk which cannot be realized. The jury therefore the a certain in the agreed that can be the of accepting are without significance."

The order of October 4, 1921, attempting to correct the judgment after trial have inadvertently entered, has the original judgment setting the time determinate period to be determined by the record before us. It is contended that there was no evidence presented at the trial to support a judgment against any of the defendants separately. However, initially, if the judgment is inherently as to determine an injury, and the Commercial Court a motion that be struck, and it also as to fundamental, individually. A judgment is a well as to all the defendants against whom it has been rendered and cannot be reversed in by one or more of them and affirmed as to the others, but it appears as to one it is erroneous as to all. (Cannon v. Illinois Central Ry., 201 Ill. 97, and subsequent cited cases.) While a different rule may have been considered under the provisions of the civil practice act since it became effective, this cause was tried prior to January 1, 1921, and must necessarily be governed by the rule above set forth.

Finally it was a matter April 21, 1922, which was treated by Bowling, in filing the bill of exceptions from the fifth because (1) it was not written and signed by the trial judge before it was filed March 24, 1922; (2) it was not written and signed by the trial judge until September 30, 1922, more than six months after the time fixed by the court for the filing and without the time for the filing thereof having been extended; (3) it purports to have been presented to a judge other than the trial judge on March 24, 1922, without showing the difference or indefinite part in asking to present the bill to the trial judge and (4) the trial judge did not certify that the contents bill of exceptions contained all the evidence introduced at the trial of this cause.

It is sufficient answer to plaintiff's contention that the bill of exceptions should be stricken because the court did not certify that it contained all the evidence introduced at the trial to state that, if that were the fact, while it might render the bill ineffective insofar as the review of the cause is concerned, it has never been held to afford a legal reason for striking it. However, the bill of exceptions certified by the trial court contained the recital of the court reporter, as hereinafter set forth, that it included all the evidence offered and received on behalf of all parties at the trial.

In the absence of the trial judge, who was not a regular judge of the circuit court but presided therein intermittently under statutory call, the bill of exceptions was presented within a few days of the expiration of the time allowed for its approval to Judge Finnegan of that court, whose certificate indorsed on same was as follows:

"His Honor, Herbert S. Anderson, not sitting, the above this day presented by Lloyd C. Whitman, attorney for defendants, and received by the court and so marked.
Presented March 24, 1933,
Philip J. Finnegan
Judge of said Court."

September 29, 1933, Judge Herbert S. Anderson, the trial judge, approved, signed and sealed the bill of exceptions, which contained above the certificate of the judge the following recital of the court reporter:

"Which was all the evidence offered or received and other proceedings had before the court, on behalf of all parties, at the trial of the above entitled and numbered cause."

Thereafter, on February 14, 1935, plaintiff stipulated with defendants that the original bill of exceptions, in lieu of a copy thereof, might be used by the clerk of the trial court in preparing the transcript of the record for this court. By this stipulation plaintiff is estopped to say that the bill of exceptions was not signed, sealed and filed in due time. (Berz v. Mecartney, 115

It is sufficient answer to plaintiff's contention that the bill of exceptions should be stricken because the court did not certify that it contained all the evidence introduced at the trial to state that, if that were the fact, which it might prevent the bill ineffective insofar as the review of the cause is concerned, it has never been held to afford a legal reason for striking it. However, the bill of exceptions certified by the court upon petition for review, bearing the signature of the court reporter, as hereinafter set forth, does it included all the evidence offered and received on behalf of all parties at the trial.

In the absence of the trial judge, who was not a regular judge of the circuit court but presided temporarily under statutory authority, the bill of exceptions was presented within a few days of the expiration of the time allowed for the approval by Judge Freeman of that court, who certificate appeared on page 320 of the record:

"The Clerk, Lundeen & Lundeen, not filing, the above this day presented by Lloyd L. Tillman, stating the circumstances and received by the court and so ordered.

Presented June 24, 1938.
Philip L. Freeman
Judge of said Court."

Thereafter, on July, Judge Freeman in vacation, the trial Judge, approved, signed and sealed the bill of exceptions, which contained above the certificate of the Judge the following recital of the court reporter:

"Which was all the evidence offered or received on behalf of the above entitled and numbered cause."

Thereafter, on December 21, 1938, plaintiff filed a motion to dismiss, that the original bill of exceptions, in lieu of a copy thereof, might be used by the clerk of the trial court in preparing the transcript of the record for this court. By this stipulation plaintiff is estopped to say that the bill of exceptions was not signed, sealed and filed in due time. (Bass v. Beaverton, 132

Ill. App. 66; Lederbrand v. Pickrell, 167 Ill. 624; Northwest Park District v. Rodenberg, 267 id. 388.) The motion to strike the bill of exceptions is denied.

Notwithstanding that we are convinced from a careful examination of the entire record in this cause that plaintiff presented a meritorious claim against the defendant Pearsons, individually, we are, for the reasons stated herein, compelled to reverse the order of October 4, 1933, and the judgment of January 25, 1933, and remand the cause for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

122. Ann. Ann. Institutes v. Clarkson, 247 Ill. 488, 493 Southern Pacific Railway v. Bourquin, 267 U.S. 282). The motion to strike the bill of exceptions is denied.

Notwithstanding that on the preliminary item a motion denomination of the trial court to bring motion that plaintiff presented a motion upon which the defendant demurred, inasmuch, we note that the motion should merely, requiring to reverse the order of October 4, 1926, and the judgment of January 24, 1927, and remand the cause for a new trial.

REVERSED AND REMANDED.

Dissenting, Mr. J. and Trimble, J., concurring.

43

38073

JOHN W. DOBBINS,
Defendant in Error,

v.

HARRY P. PEARSONS, H. P. PEARSONS as trustee, and COMMERCIAL TRUST & SAVINGS BANK, a corporation, as trustee,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

283 I.A. 636

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

John Dobbins, plaintiff, was a farm laborer employed by defendant Harry P. Pearsons. He secured a judgment in the circuit court for $550 for a balance due and unpaid on his wages as such farm laborer against the Commercial Trust & Savings Bank as trustee, and Pearsons, individually and as trustee. All three defendants bring this writ of error to reverse the judgment.

This cause was consolidated with case No. 38072 and case No. 38074 for trial in the circuit court and for hearing in this court. The opinion in case No. 38072 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 38072. The judgment rendered below in that case, except as to the amount, was the same as in this, and the same questions are presented for review. The conclusions reached in the opinion in that case are controlling here and for the reasons set forth therein the order of the circuit court of October 4, 1933, is reversed and the judgment of January 25, 1933, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

[illegible]

[illegible]

[illegible]

38074

44

FRESLEY L. NEVILLE,
Defendant in Error,

v.

HARRY F. PEARSONS, H. F. PEARSONS as trustee, and COMMERCIAL TRUST & SAVINGS BANK, a corporation, as trustee,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

283 I.A. 637

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Fresley L. Neville, plaintiff, was a farm laborer employed by defendant Harry F. Pearsons. He secured a judgment in the circuit court for $472 for a balance due and unpaid on his wages as such farm laborer against the Commercial Trust & Savings Bank as trustee, and Pearsons, individually and as trustee. All three defendants bring this writ of error to reverse the judgment.

This case was consolidated with case No. 38072 and case No. 38073 for trial in the circuit court and for hearing in this court. The opinion in case No. 38072 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 38072. The judgment rendered below in that case, except as to the amount, was the same as in this, and the same questions are presented for review. The conclusions reached in the opinion in that case are controlling here, and for the reasons set forth therein the order of the circuit court of October 4, 1932, is reversed and the judgment of January 28, 1933, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

45

38080

MARY LANG CUMMER,
Appellee,

v.

WILLIAM M. CUMMER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

283 I.A. 637

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

October 25, 1929, plaintiff, Mary Lang Cummer, was granted a decree of divorce from her husband, William M. Cummer. Plaintiff was paid $66,000 in settlement of her property rights, and the care and custody of their minor child, Lang Cummer, was awarded to William M. Cummer, then living in France with the child.

Plaintiff filed a petition January 24, 1934, for the modification of the decree of divorce as to the custody of the child. Pursuant to this petition, and without the knowledge of or notice to defendant, plaintiff secured an order modifying the decree and giving the custody of the child, Lang, to her, as well as numerous other orders and judgments. Defendant's petitions of October 9, 1934, and October 25, 1934, to vacate all orders and judgments entered against him since the entry of the decree of divorce were stricken November 30, 1934. He prayed and perfected an appeal from the order of the trial court of November 30, 1934, striking his petitions to vacate, which was docketed in this court as case No. 38018, and this cause was consolidated with that case for hearing. December 24, 1934, an order was entered by the chancellor requiring defendant to pay plaintiff $250 solicitor's fees and $75 expenses for her defense of the above appeal. The instant appeal seeks to reverse this last order.

In our opinion filed in case No. 38018 concurrently with this opinion, we held that the trial court was without jurisdiction to enter the several orders and judgments sought to be vacated by defendant's petitions, inasmuch as they were entered without notice to or the knowledge of defendant. Therein we reversed the order of the Superior court striking defendant's petitions to vacate and remanded the cause with directions to grant the prayer of such petitons to vacate all the orders and judgments entered against defendant subsequent to the entry of the decree of divorce October 25, 1929.

The court having had no jurisdiction of the person of defendant, it necessarily followed that it lacked authority to enter an order for plaintiff's expenses and solicitor's fees in connection with defendant's appeal in case No. 38018, or for any other purpose. The order of December 24, 1934, allowing $250 solicitor's fees and $75 expenses to plaintiff to defend the appeal in case No. 38018 is reversed.

REVERSED.

Scanlan, P. J., and Friend, J., concur.

In our opinion, filed in view of, United Kingdom, with this opinion, we hold that the trial court was without jurisdiction to order the several orders and judgments which is be vacated by defendant's pleadings, because, as they were obtained without notice to or the knowledge of defendant. Therefore we reversed the order of the superior court granting defendant's petition to vacate and remanded the cause with directions to grant the prayer of such petition in terms of the order and judgments entered against defendant upon notice to the entry of the orders of divorce herein.

The court's order for the jurisdiction of the person of defendant, it erroneously followed that it lacked authority to order on with the plaintiff's complaint and petitioner's from in accordance with defendant's appeal in case No. 2832, or the other purpose. The order of October 24, 1954, allowing petitioner's fees and ITS requires the plaintiff be entered the appeal in case No. 2832 is reversed.

Dwyer, J., Ann Pickett, J., concur.

38129

MURRAY HILL APARTMENTS BUILDING CORPORATION, a corporation,
Appellant,

v.

MRS. JOHN W. FLOTO, also known as Dorothy Floto,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 637

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

June 18, 1934, plaintiff, Murray Hill Apartments Building Corporation, confessed judgment on a certain lease under seal against defendant, Mrs. John W. Floto, also known as Dorothy Floto, (hereinafter referred to as Mrs. Floto) for $410. On petition of defendant the judgment was opened and she was given leave to defend, her petition standing as an affidavit of defense. After trial by the court without a jury the issues were found for defendant and final judgment entered accordingly. This appeal followed.

Plaintiff's statement of claim, attached to which and made a part thereof was its written lease with defendant of an apartment in the premises located at 4300 Lake Shore drive, Chicago, alleged that under said lease defendant was indebted to plaintiff for rent due for the months of March and April, 1934, at $175 a month, plus attorney's fees of $60.

Defendant's petition to vacate the judgment by confession alleged, as the only defense which it attempted to support by evidence, that plaintiff orally agreed to the cancellation of the lease in February, 1934, in consideration of her surrender of the premises at that time.

Plaintiff contends that the alleged contract cancelling

Plaintiff's abandonment of claim, attached to which was such a part thereof was its written lease with defendant of an apartment in the premises located at 4800 Lake Shore Drive, Chicago, alleged that under said lease defendant was indebted to plaintiff for rent due for the months of March and April, 1924, at $175 a month, plus attorney's fees of $50.

Defendant's petition to vacate the judgment by confession alleged, as the only defense which it attempted to support by evidence, that plaintiff orally agreed to the cancellation of the lease in February, 1924, in consideration of her surrender of the premises at that time.

Plaintiff contends that the alleged contract conveying

the lease was made, if at all, with one of its agents who had no authority to enter into such a contract and that defendant was apprised of the agent's lack of authority by the last clause of the lease, which reads as follows:

> "Twenty-first. It is understood and agreed that no manager, agent or employe of the lessor, except its officers, has authority or power to bind the lessor by any contract altering, varying or cancelling this lease."

Plaintiff further contends that there is no evidence in the record proving or tending to prove that a contract cancelling the lease had been entered into between defendant and any agent of plaintiff.

Defendant's theory is that plaintiff's agent did enter into a binding contract with her to cancel the lease and that plaintiff is estopped to deny the authority of its agent to make the alleged contract of cancellation by reason of its having clothed him with implied or apparent authority to do so.

The lease was executed by plaintiff, as lessor, as follows: "Murray Hill Apartments Building Corporation, by Leonard H. Skoglund (Seal)," and by "John W. Floto, (Mrs.) J. W. Floto (Seal)." Leonard H. Skoglund was president of the lessor corporation and resided in the building at 4300 Lake Shore drive. Plaintiff had in its employ, as an agent, one Robert C. Graham, who was not and never had been one of its officers.

Mrs. Floto testified in her own behalf that she had all her dealings with Graham; that he was constantly on the premises; that it was he who submitted her lease to her; that "she thought the building was owned by Mr. Fallon, and that Mr. Graham was in charge;" that she had several conversations with Graham during the months of January and February, 1934; that she told him that her family was becoming so large that she was obliged to move into a larger apartment; that she had found a new apartment and expected to move into same in the early part of February; that Graham said that would be all right and that he thought

the lease was made, if at all, with one of the agents who had no authority to enter into such a contract and that defendant was aggrieved of the agent's lack of authority by the last clause of the lease, which reads as follows:

"Freely-altered. It is understood and agreed that no agent, agent or employee of the lessor, except the attorney, has authority to bind the lessor by this lease or any verbal statement, varying or modifying this lease."

Plaintiff further contends that there is no evidence in the record showing or tending to show that a contract concerning the lease had been entered into between defendant and the agent of plaintiff.

Defendant's theory is that plaintiff's agent did make the lease a binding contract with her to cancel the lease and that plaintiff is estopped to deny the authority of the agent to make the alleged contract of cancellation by reason of its having clothed him with implied or apparent authority to do so.

The lease was executed by plaintiff, as lessor, on February fifth Apartments Building Corporation, by Leonard H. Sheppard (Seal)," and by "Ada M. Ziegler, (Seal) Jr." Leonard H. Sheppard was president of the Lessor corporation and resided in the building at 4500 Lake Shore drive. Plaintiff had in its employ, as an agent, one Robert G. Graham, who was not and never had been one of its officers.

Mrs. Ziegler testified in her own behalf that she had all her dealings with Graham; that he was responsible on the premises; that it was he who published her lease to her; that "she thought the building was owned by Mr. Miller, and that Mr. Graham was in charge;" that she had several conversations with Graham during the months of January and February, 1931; that she told the last her family was growing so large that she was obliged to move into a larger apartment; that she had found a new apartment and expected to move into same in the early part of February; that Graham said that would be all right and that he thought

there would be no difficulty in procuring a new tenant; that she understood that she was released from payment of any more rent; that she moved February 8, 1934, on which date she paid her rent up to the end of February; that when she moved she assumed that everything was all right and that she was released from payment of rent for March and April; that she left some Venetian blinds in the apartment, which, at her request, were sold by Graham for $50, for which sum she was afterward given credit; and that on the day she moved she gave Graham a key to her apartment.

Graham, the only other witness at the trial, testified in part that he had several conversations with defendant prior to her moving, in all of which she said that she was compelled to move to larger quarters on account of the "growth of her family;" that in his conversations with her he told her that, having no authority to do so, he could not cancel her lease and that she would have to pay rent for March or April whether she moved or not; that when defendant moved she gave him one key to her apartment with instructions to rerent it, if he could; that she asked him to sell her Venetian blinds, if possible, and credit her with the proceeds; that he sold the blinds to the tenant who succeeded her in the apartment for $50 and credited her account with that amount; that he was not and never had been an officer of plaintiff; that he never had any power or authority from plaintiff to cancel or modify defendant's lease; that he did not by word of mouth nor in any other way cancel or attempt to cancel her lease, and that he never told her that it was cancelled; and that the apartment in question was thereafter leased for a term commencing May 1, 1934, at a rent of $160 a month.

Even though it be conceded that plaintiff's agent, Graham, had authority to bind plaintiff by an oral contract cancelling the lease, is there any evidence in the record that such a contract was actually entered into? We have carefully examined and considered

there would be no difficulty in proving a new tenancy that she understood that she was relieved from payment of any more rent; that she never February 8, 1941, on which date she paid her rent up to the end of February then she moved she assumed that everything was all right and that she was relieved from payment of rent for March and April; that she left some furniture behind in the apartment, which, as her witness, was sold by Graham for $20, for which sum she was allowed given credit; and that on the day she moved she gave Graham a key to her apartment.

Graham, the only other witness at the trial, testified in part that he had several conversations with defendant prior to her moving; in all of which she said that she was compelled to move to larger quarters on account of the "crowd of her family;" that in his conversations she had told her that, having no authority to do so, he could not consent her leave and that she would have to pay rent for March or April whether she moved or not; that when defendant moved she gave him the key to her apartment with instructions to return it, if he wanted that she make him to call her Veronica Mitchell, if possible, and credit her with the proceeds; that he sold the visits to the lawyer who succeeded her in the apartment for $20 and credited her account with that amount; that he was not and never had been an officer of plaintiff; that he never had any power or authority from plaintiff to cancel or modify tenancies; lastly that he did not by word of mouth nor in any other way cancel or attempt to cancel her lease, and that he never told her that it was cancelled; and that the apartment in question was subsequently leased for a term commencing May 1, 1941, at a rent of $20 a month.

Even though it be conceded that plaintiff's agent, Graham, had authority to bind plaintiff by an oral contract cancelling the lease, is there any evidence in the record that such a contract was actually entered into? We have carefully examined and considered

every word of defendant's testimony, both competent and incompetent, and, allowing full credence to all of it, we fail to find any of the elements of a valid, binding contract in her testimony. All that she states that Graham said to her was "that would be all right and he thought there would be no difficulty in procuring a new tenant," after she had told him "I had found a new apartment and that I expected to move in the early part of February." From that she concluded "I understood that I was then released from payment of any more rent * * *. When I moved I assumed that everything was all right, that I was released from payment of any further rent for March and April." These statements of defendant do not constitute evidence of the existence of a contract to cancel the lease; neither do they contain any evidence of a definite promise that defendant was or would be released from her covenant to pay rent. According to her own testimony she never requested plaintiff or its agent that the lease be cancelled or that she be released from the payment of rent. She merely states that she told Graham that "her family was becoming so large she was obliged to move into a larger apartment," that she had found one, that she was going to move and that he said all right. Mrs. Flote did not testify that Graham said that she would be released, but stated merely that she "understood she was released from payment of rent," and that she "presumed that she was released from payment of any further rent."

However, there are several other grounds on which the judgment must be reversed, only one or two of which need be considered. A person dealing with an agent cannot hold his principal on the ground of the apparent authority of the agent, where he has actual or constructive notice of the extent or limitation of the agent's authority. It is undisputed that Graham was an agent and not an officer of the lessor. Clause 21 of the lease, heretofore set forth and of which defendant must be assumed to have had knowledge, reserved

every word of defendant's testimony, both compelled and incompetent, and, allowing full credence to all of it, we fail to find any of the elements of a valid, binding contract in her testimony. All that she stated that Grahm said to her was "that would be all right and he thought there would be no difficulty in procuring a new lawsuit," after she had told him "I had found a new lawyer and had i ex-pected to move in the early part of February." From that she con-cluded "I understood that I was then relieved from payment of my note * * *". Then I moved I assumed that everything was all right, that I was relieved from payment of any further rent for March and April." These statements of defendant do not constitute evidence of the existence of a contract in manner, the lease; neither do they contain any evidence of a reliable promise that defendant was or would be released from her covenant to pay rent. According to her own testimony she never requested plaintiff or his agent that the lease be cancelled or that she be released from his payment of rent. She merely stated that she told Grahm that "her family was planning to leave she was obliged to move into a larger apartment," that she had found one, that she was going to move and that he said all right. Mrs. Fiske did not testify that Grahm said that she would be released, but stated merely that she "understood she was released from payment of rent," and that she "presumed that she was released from payment of any further rent."

However, there are several other grounds on which the judg-ment must be reversed, only one of which need be considered. A person dealing with an agent cannot hold his principal on the ground of the apparent authority of the agent, where he has actual or constructive notice of the extent or limitation of the agent's authority. It is undisputed that Grahm was an agent and not an officer of the Lessor. Clause XI of the lease, hereinbefore set forth and of which defendant must be assumed to have had knowledge, reserved

authority to cancel the lease to officers of the lessor and expressly denied such authority to its agents or employees. This clause constituted notice to defendant of Graham's want of authority and that plaintiff, therefore, was not bound by any alleged contract of cancellation that Graham may have negotiated. A third person must use reasonable care and prudence before he is justified in believing that the principal's acts and conduct have clothed the agent with the appearance of authority to perform certain acts for his principal, and, if such person has actual or constructive notice of the extent of the agent's authority, he cannot claim to be acting in good faith and hold the principal on the ground of apparent authority. (Pardon v. Masvary, 249 Ill. App. 327; Nulsen v. Terre Haute Brg. Co., 203 Ill. App. 119; Schmoldt v. Langston, 106 Ill. App. 385; National Fire Ins. Co. v. John Spry Co., 235 Ill. 98.)

Where the parties to a contract stipulate therein as they did in the lease involved here, as to the authority or lack of authority of an agent to alter or amend the contract, they are bound by that stipulation. In the face of the stipulation in the lease, heretofore referred to, there could be no implied agreement as to the extent of Graham's authority. That is expressly limited by clause 21 of the lease, which was notice to defendant of Graham's want of authority to enter into a contract for the cancellation of a lease.

For the reasons stated herein the judgment of the municipal court is reversed and, after an allowance to defendant of $50 received by plaintiff through Graham for the sale of Mrs. Floto's Venetian blinds, judgment is entered here for plaintiff and against defendant for $360, which includes as part of said judgment the sum of $60 for attorney's fees.

REVERSED AND JUDGMENT HERE FOR PLAINTIFF AND AGAINST DEFENDANT FOR $360.

Scanlan, P. J., and Friend, J., concur.

authority to convert the Jones Co. officers of the lessor and corporate by denied such authority to its agents or employees. This claim contributed which is inconsistent of claimant's want of authority and that plaintiff, therefore, was not bound by any alleged contracts of representative individuals for lack authority. I find prior and reasonable care and production before he is justified in believing that the principal's acts and conduct have clothed the agent with the appearance of authority to perform certain acts for his principal, and, if such person has acted or contributed action of the extent of the agent's authority, he cannot claim to be acting in good faith and the principal is the proper or apparent authority. (Jones v. Harvey, 245 Ill. App. 417; Bulkley v. Ferry Auto Co., 245 Ill. App. 184; Langdale v. Lumsden, 248 Ill. App. 488; Kuhlman Tire Co. v. John Doe Co., 338 Ill. App.)

Where the policies is a contract alleging therein as they did in the lease involved here, as to the authority or lack of authority of an agent to alter or amend the contract, they are based by that stipulation. In the face of the stipulation in the lease, possession retained by lessor could be an implied agreement as to the extent of lessee's authority. That is apparently limited by clause 21 of the lease, which was notice to customers of lessee's want of authority to enter into a contract for the conditionation of a lease.

For the reasons stated herein the judgment of the municipal court is reversed and, after an allowance to defendant of $50 received by plaintiff already from her the sum of $75, Kate's Vanities Shop, judgment is entered here for plaintiff and against defendant for $125, which includes as part of said judgment the sum of $50 for attorney's fees.

REVERSED AND JUDGMENT HERE FOR PLAINTIFF AGAINST DEFENDANT FOR $125.

Scanlan, P. J., and Friend, J., concur.

47 H

38139

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO CRIMINAL
v.	COURT, COOK COUNTY.
MARTIN TARRACCIANO, alias Martin Terry, alias Frank Baldiano, Plaintiff in Error.	

283 I.A. 637

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Martin Tarracciano, alias Martin Terry, alias Frank Baldiano (hereinafter referred to as Tarracciano) entered a plea of guilty in the Criminal court of Cook county in May, 1931, to an indictment charging him with obtaining money by the use and means of the confidence game and was placed on probation for one year pursuant to the provisions of the statute on probation. During a hearing for violation of his probation for failing to report to the probation office monthly and for failing to report his change of address after the alleged removal of his residence from the address theretofore given by him to his probation officer, he was found guilty of an alleged direct contempt of court and on February 21, 1935, sentenced to serve a term of imprisonment of ninety days in the House of Correction. This writ of error is brought to reverse the judgment of the trial court finding Tarracciano guilty of contempt.

The contemnor contends that the court erred in finding that he "willfully, falsely and corruptly perjured and gave false testimony upon the hearing of his violation of probation" and in finding that said testimony was material to matters then and there in question.

In People v. Anderson, 272 Ill. App. 93, in passing upon

In People v. Jackson, 272 Ill. App. 45, in passing upon the question of the right of the defendant to be "virtuous, chaste and morally polished and free from testimony upon the matter of his violation of probation" and in finding that said testimony was material to motive then and there in question, the Supreme Court of Illinois said:

an order finding Anderson guilty of a direct contempt for his alleged perjury and imposing a sentence of a term of imprisonment upon him, this court said at p. 99:

"In People ex rel. Bain v. Feinberg, 266 Ill. App. 306, the court held that a bill of exceptions has no proper place in a record brought to review a sentence imposed for a direct contempt, criminal in its nature, committed in the presence of the court; that the only matter that can properly be considered on such review is the order of the court adjudging the party to be in contempt, and that because of this rule the law requires that the contempt order set out all the facts constituting the alleged contempt, so that the reviewing court may see whether or not such facts constitute a direct contempt. (See also People v. Hogan, 256 Ill. 496, 499.) In People v. Bain, 268 Ill. App. 192, the court, after stating the rule announced in the Feinberg case said: 'It follows that the order of commitment must be scrutinized carefully in order to determine whether it sets out the facts constituting the offense so fully and certainly as to show that the court was authorized to make the order.'"

The findings contained in the judgment order in the instant case are as follows:

"The Court finds that it is within the personal knowledge of this Judge of this Court, and occurring in the presence of this court and while this Court was then and there in session, that the above entitled case came up for a hearing on the violation of probation of Martin Tarracciano, alias Martin Terry, alias Frank Baldiano, and that the contemnor was then and there present in court and was represented by counsel; that he was duly sworn and testified that he did not tell one Mrs. Louise M. Fugate, of the Probation Department of Cook County, that he had paid $50.00 to James Stickel, who was his probation officer in the above entitled case; that Mrs. Louise M. Fugate was sworn and testified that the contemnor, Martin Tarracciano, alias Martin Terry, alias Frank Baldiano, had told her that he had paid James Stickel $50.00 to have a warrant for violation of probation dismissed; that upon being further questioned by the Court that said contemnor, Martin Tarracciano, alias Martin Terry, alias Frank Baldiano, did state that he had misstated the facts and that he did tell Mrs. Louise M. Fugate, of the Probation Department of Cook County, Illinois, that he gave James Stickel, a probation office, $50.00 to have the warrant for violation of probation dismissed.

"The Court accordingly finds that because of the matters and things hereinbefore set out the said Martin Tarracciano, alias Martin Terry, alias Frank Baldiano, willfully, falsely and corruptly perjured and gave false testimony upon the hearing of his violation of probation on, to-wit, the 15th day of February, A. D. 1935; that said testimony was material to matters then and there in question, and that the same was an imposition upon this Court and was calculated and intended to and did impede, embarrass and obstruct this court in the due administration of justice."

The order then recites that the court finds Tarracciano "guilty of a direct and deliberate contempt of this court in open court" and adjudged that he be sentenced to the House of Correction.

an order finding authors guilty of a direct contempt for his alleged perjury and imposing a sentence of a term of imprisonment upon him, this court said on p. 59:

"In People ex rel. Brin v. Rohmer, 300 Ill. 59, 60, the court held that a bill of [illegible] the so proper place in a tenant brought to review a continue imposed for a direct contempt, criminal in its nature, committed in the presence of the court; that the only matter that can properly be considered on such review is the order of the court adjudging the party to be in contempt, and that because of this rule the law requires that the contempt order set out all the facts constituting the alleged contempt, so that the reviewing court may see whether or not such facts constitute a direct contempt. (See also People v. Sherer, 300 Ill. 180, 184.) In People v. Hall, 216 Ill. App. 189, the court, after stating the rule announced in the Rohmer case said: 'It follows that the order of commitment must be scrutinized carefully in order to determine whether it sets out the facts constituting the offense so fully and certainly as to show that the court was authorized to make the order.'"

The finding contained in the judgment order in the instant case are as follows:

"The court finds that it is within the personal knowledge of this Judge of this Court, and occurring in the presence of this court and while this Court was then and there in session, that the above entitled case came up for a hearing on the violation or prohibition of martial terrorism, Allen Martin Terry, Allen Frank Building, and that the defendant was then and there present in court and was represented by counsel; that he was duly sworn and testified that he did not tell Mrs. Louise E. Hughes, of the prohibition department of Cook County, that he had paid $50.00 to James Colbert, who was his prohibition officer in the above entitled cause; that Mrs. Louise E. Hughes was sworn and testified that the defendant, Martin Terrorism, Allen Martin Terry, Allen Frank Building, had told her that he had paid James Colbert $50.00 to have a warrant for violation of prohibition dismissed; that upon being further questioned by the court that said defendant, Martin Terrorism, Allen Martin Terry, Allen Frank Building, did state that he had misstated the facts and that he did tell Mrs. Louise E. Hughes, of the Prohibition Department of Cook County, Illinois, that he gave James Colbert, a prohibition officer, $50.00 to have the warrant for violation of prohibition dismissed.

"The Court accordingly finds that because of the matters and things hereinbefore set out the said Martin Terrorism, Allen Martin Terry, Allen Frank Building, willfully, feloniously and contemptuously perjured and gave false testimony upon the hearing of his violation of prohibition on, to-wit, the 15th day of February, A. D. 1930; that said testimony was material to matters then and there in question, and that the same was an imposition upon this Court and was calculated and intended to and did impede, embarrass and obstruct this court in the due administration of justice."

The order then recites that the court finds Terrorism "guilty of a direct and deliberate contempt of this court in open court" and adjudged that he be sentenced to the House of Correction.

It will be noted that the order contains no finding of fact that the contemnor paid Stickel $50 or any other sum of money, or that Stickel received $50 or any other amount from Tarracciano or in his behalf "to have a warrant for violation of probation dismissed." The findings of fact are that he first denied telling Mrs. Fugate that he had paid Stickel, his probation officer, $50, and then admitting that "he did tell Mrs. Fugate that he gave James Stickel, the probation officer, $50 to have a warrant for violation of probation dismissed." The order also found that this false testimony "was material to matters then and there in question," and it must be conceded that perjury or false swearing that will subject a witness to punishment for direct contempt of court must be as to a matter material to the issue in question.

The issue before the trial court was whether or not Tarracciano was guilty of violation of his probation. We can readily perceive that the payment of money by him to his probation officer to have the warrant for such violation dismissed would be material to that issue. However, in the absence of any finding of fact in the order that contemnor paid money to Stickel, or that Stickel received money from him or in his behalf for the dismissal of the warrant for violation, we are at a loss to understand how his testimony that he had told Mrs. Fugate that he had paid $50 to Stickel, after first denying that he had done so, could be considered material to the question before the court.

We must hold that the testimony of Tarracciano as to what he did or did not tell Mrs. Fugate as to the payment of money to Stickel was immaterial to the issue before the court and afforded no legal ground for finding him guilty of direct contempt unless the order also contained a finding of fact that he paid money to the probation officer or that the probation officer received money from him or in his behalf, which it did not. Therefore, the finding that contemnor was guilty of direct contempt was unwarranted and the judgment order of the criminal court is reversed. REVERSED.

Scanlan, P. J., and Friend, J., concur.

It will be noted that the court concludes no finding of fact that the customer paid tribute 100 or any other sum of money, or that Robert received 100 or any other amount from Tarrentino or in his behalf "in lieu a reward for violation of production ordinance." The findings of fact are that he first denied taking 100; Tugwin then he had paid tribute, the production officer; and then admitting that "he did tell Jerry Tugwin that he gave Robert, the production officer, 100 in lieu a reward for violation of production directions." The court also found that this false testimony "was material to matters then and there in question," and it must be concluded that perjury or false swearing that will subject a witness to punishment for misdemeanor of course must be as to a matter material to the issue in question.

The issue before the trial court was whether or not Tarrentino was guilty of violation of his production. We can readily perceive that the payment of money by him to the production officer to have the warrant for violation withdrawn would tend to indicate by that issue. However, in the absence of any finding of fact in the order that customer paid money to Robert, or that Robert received money from him or in his behalf for the dismissal of the warrant for violation, we are at a loss to understand how his testimony that he had told Jerry Tugwin that he had paid 100 to Robert, after first denying that he had done so, could be material material to the question before the court.

We must hold that the testimony of Tarrentino as to what he did or did not tell Mr. Tugwin as to the payment of money to Robert was immaterial to the issue before the court and affected no legal rights for finding him guilty of direct contempt when the order also contained a finding of fact that he paid money to the production officer or that the production officer received money from him or in his behalf, which he did not. Therefore, the finding that defendant was guilty of direct contempt was unwarranted and the judgment entered at the criminal term is reversed.

Scanlan, J., and Pickard, J., concur.

38456

LEMAIRE, Inc., a Corporation,
for use of CHARLES V. FALKENBERG,
Appellant,

vs.

ROBERT P. GUST,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

283 I.A. 638

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment rendered by the court in garnishment proceedings. We gather that Charles V. Falkenberg obtained a judgment against Lemaire, Inc., a corporation, but the abstract fails to state when the judgment was obtained or the amount. Apparently an affidavit for garnishee summons was filed; defendant garnishee answered, but the abstract gives no information as to the character of the answer. We shall assume the defendant answered that he had no property belonging to the judgment debtor and owed it nothing. From the testimony of a witness the judgment apparently was for approximately $1700.

Defendant testified that Lemaire, Inc., the judgment debtor, owed him $4100 which has not been paid. The court ruled that the garnishee could set off this claim, and discharged the garnishee. The ruling was proper. Section 13 of the Garnishment act, Ill.State Bar Stats., chap. 62, provides that a garnishee may retain or deduct out of any property, effects or credits in his hands all demands against the plaintiff. This practice is approved in Levinson v. Home Bank and Trust Co., 337 Ill. 241. Apparently the only argument made by plaintiff against this is that the garnishee filed no plea of set-off. As we have said, the abstract is silent on this point, and in any event we do not understand that a plea of set-off must be filed by the garnishee. The statute seems to contemplate that the set-off may be asserted upon the trial, as was done in Paisley v. The Park Fireproof Storage Co., 222 Ill. App. 96.

We see no reason to disagree with the trial court, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

[illegible]

LEMAIRE, INC., a corporation,
for use of CHARLES V. [illegible],
Appellant,

vs.

ROBERT F. [illegible],
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

293 I.A. 638

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment rendered by the court in garnishment proceedings. It appears that Charles V. [illegible] had obtained a judgment against Lemaire, Inc., a corporation, but the abstract fails to state when the judgment was obtained or the amount. Apparently an affidavit for garnishee summons was filed; defendant garnishee answered, but the abstract gives no information as to the character of the answer. We shall assume the defendant answered that he had no property belonging to the judgment debtor and owed it nothing. From the testimony of a witness the judgment apparently was for approximately $[illegible].

Defendant testified that Lemaire, Inc., the judgment debtor, owed him $[illegible] which had not been paid. The court ruled that the garnishee could set off this claim, and discharged the garnishee. The ruling was proper. Section 11 of the Garnishment act, Ill. State Bar Stats., chap. 62, provides that a garnishee may retain or deduct out of any property, effects or credits in his hands all demands against the plaintiff; this practice is approved in [illegible] v. [illegible] Bank and Trust Co., [illegible] Ill. [illegible]. Apparently the only argument made by plaintiff against this is that the garnishee filed no plea of set-off. As we have said, the abstract is silent on this point, and in any event we do not understand that a plea of set-off must be filed by the garnishee. The statute seems to contemplate that the set-off may be asserted upon the trial, as was done in [illegible] v. [illegible], [illegible] Ill. App. [illegible].

We see no reason to disagree with the trial court, and the judgment is affirmed.

AFFIRMED.

MATCHETT and O'CONNOR, JJ., CONCUR.

38530

CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust Deed recorded in the Recorder's Office of Cook County, Illinois, as Document No. 9680233,

Appellee,

vs.

JOSEPH A. GEILEN and MARTHA M. GEILEN, his wife, et al.,

Defendants.

CENTRAL REPUBLIC TRUST COMPANY, a Corporation,
Intervening Petitioner.

ARTHUR COX and FRIEDA COX, his wife,
Intervening Petitioners.

On Appeal of WILLIAM L. O'CONNELL, as Liquidating Trustee for MADISON-KEDZIE TRUST & SAVINGS BANK,
Intervening Petitioner,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

283 I.A. 638

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This appeal involves the disposition of a share of rent moneys collected, prior to the appointment of a receiver, from the premises which are the subject matter of a foreclosure proceeding. The opposing claimants to this share are the Madison-Kedzie State Bank, afterward taken over by the Madison-Kedzie Trust and Savings Bank, on the one hand, and the Madison Square State Bank on the other. For convenience the former bank will hereafter be referred to as the Madison-Kedzie bank to distinguish it from the Madison Square bank.

Under an arrangement with the mortgagors, Joseph A. Geilen and Norbert W. Weber, the Madison-Kedzie bank for a time, and the Madison Square bank subsequently, collected the rentals of the Scoville apartments, the subject of the foreclosure proceedings. The question as to the disposition of these moneys was referred to a master in chancery who took evidence and reported, recommending that the Madison-Kedzie bank was entitled to a pro rata share in

DISTRIBUTION THE ORDER OF THE COURT.

This second involves the disposition of a fund of two money collected, prior to the appointment of a receiver, from the premises which are the subject matter of a foreclosure proceeding. The opposing claimants to this fund are the Madison-Dearborn Bank, referred hereinafter to as the Madison-Dearborn Trust and Savings Bank, on the one hand, and the Madison Square State Bank on the other. For convenience the former bank will hereafter be referred to as the Madison-Dearborn and to distinguish it from the Madison Square bank.

Prior to proceedings with the foreclosure, Henry S. Geisler and Norbert G. Euler, the Madison-Dearborn loan for a time, and the Madison Square bank subsequently, collected the rentals of the Deville apartments, the subject of the foreclosure proceedings. The question as to the disposition of these moneys was referred to a master in chancery who took evidence and reported, recommending that the Madison-Dearborn bank was entitled to a pro rata share in

these moneys; exceptions to his report were filed which were sustained by the court, which awarded the entire amount of these collections to the plaintiff for the benefit of the bondholders secured by the deed of trust foreclosed.

The amount claimed by the Madison-Kedzie bank is approximately $2248.95. The correct disposition of this money rests upon the facts which took place prior to the appointment of a receiver in the foreclosure suit. The Madison-Kedzie bank claims that it stands in the position of the mortgagors under the trust deed, who are entitled to the rents until a receiver takes actual possession, citing Rohrer v. Deatherage, 336 Ill. 450.

The complaint seeking to foreclose the trust deed was filed September 25, 1931, but prior to this, on May 25, 1929, the mortgagors, Geilen and Weber, had borrowed $25,000 from the Madison-Kedzie bank on their unsecured promissory note; they were unable to pay their indebtedness to the Madison-Kedzie bank and demand was made by the bank for some security; on July 15, 1930, Geilen and Weber had created a trust by executing and delivering a deed of trust to the Madison Square bank as trustee creating Trust No. 1009; under the terms of this trust Geilen had a one-half beneficial interest and Weber the remaining one-half; the rents, issues and profits, pursuant to the terms of the trust agreement, were specifically reserved for the beneficiaries, Geilen and Weber; the trust agreement authorized the trustee Madison Square bank to deal with the real estate only when authorized to do so in writing by the beneficiaries.

Geilen and Weber were not only indebted to the Madison-Kedzie bank but also to the Madison Square bank, and on October 7, 1930, they conveyed to these banks, as their respective interests might appear, all of their beneficial interest in Trust No. 1009. These debts to the two banks are not connected with the

[illegible] monies; exceptions to his report were filed which were sustained by the court, which amended the entire amount of these exceptions to the plaintiff for the benefit of the bondholders secured by the deed of trust foreclosed.

The amount claimed by the Madison-Dearie bank is approximately $[illegible]. The material discussion of this money turns upon the facts which took place prior to the appointment of a receiver in the foreclosure suit. The Madison-Dearie bank claims that it stands on the position of the mortgagee under the trust deed, and are entitled to the rents until a receiver been duly appointed. citing Cooper v. Cunningham, 194 Ill. 430.

The complaint sounding in foreclosure the trust deed was filed September 26, 1921, but prior to this, on May 26, 1921, the mortgagors, Dalton and Weber, had borrowed $25,000 from the Madison-Dearie bank on their promissory note; they were unable to pay their indebtedness to the Madison-Dearie bank and demand was made by the bank for some security; on July 12, 1921, Dalton and Weber had created a trust by executing and delivering a deed of trust to the Madison Square Bank as trustee covering Tract No. 1[illegible]; under the terms of this trust deed a one-half interest in fee, subject to the rights of the remaining one-half; the bank, issues and profits, pursuant to the terms of the trust agreement, were specifically reserved for the benefitiaries, Dalton and Weber; the trust agreement authorized the trustee Madison Square Bank to deal with the real estate only when authorized to do so in writing by the beneficiaries.

Dalton and Weber were not only indebted to the Madison-Dearie bank but also to the Madison Square Bank, and on October 7, 1921, that company in these cases, as their respective interests appear, all of which [illegible] [illegible] 30, 1922. These cases as the two banks are not concerned with the

debt secured by the deed of trust running to the Chicago Title & Trust Company, plaintiff.

At this time there was no default under the trust deed to plaintiff, and upon the assignment to the banks of the beneficial interest in Trust No. 1009, Geilen and Weber specifically authorized in writing the Madison-Kedzie bank to take possession of the Scoville apartments which were conveyed in the trust deed to plaintiff and to collect the rents and apply the same in a pro rata liquidation of the indebtedness of Geilen and Weber to the two banks. In pursuance of this arrangement the Madison-Kedzie bank on or about November 1, 1930, took possession of the premises and proceeded to collect the rents for the purpose of liquidating the indebtedness of Geilen and Weber to the two banks, and thereafter, on or about February 1, 1931, the Madison Square bank went into possession of the property for the same purpose and under the same arrangement.

The Madison Square bank or its receiver remained in possession of the premises, collecting the rents until January 24, 1936, at which time a receiver was appointed in the foreclosure proceeding.

By virtue of the foregoing facts the Madison-Kedzie bank claims it is entitled to the rents collected prior to the appointment of a receiver in the foreclosure suit in the ratio that Geilen and Weber were indebted to it and to the Madison Square bank.

It is clear that the Madison-Kedzie bank and the Madison Square bank, with reference to possession of the premises and the collection of rents, stood in the position of the mortgagors. Their possession was under the specific authority of the mortgagors and the rents collected were to be applied upon their indebtedness to the banks. The possession is the same as if the mortgagors had remained in possession, collected the rents and applied them to the liquidation of their debts to the respective banks. In addition to

debt secured by the deed of trust running to the Chicago Title & Trust Company, plaintiff.

At this time there was no default under the trust deed to plaintiff, and upon the assignment to the bank of the beneficial interest in Trust No. 1080, Dalton and Weber specifically authorized in writing the Madison-Dearborn Bank to take possession of the Sovville apartments which were conveyed in the trust deed to plaintiff and to collect the rents and apply the same in a pro rata liquidation of the indebtedness of Dalton and Weber to the two banks. In pursuance of this arrangement the Madison-Dearborn Bank on or about November 1, 1930, took possession of the premises and proceeded to collect the rents for the purpose of liquidating the indebtedness of Dalton and Weber to the two banks, and thereafter, on or about February 1, 1931, the Madison Square Bank sent into possession of the property for the same purpose and under the same arrangement.

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the Rohrer case above referred to, the following cases support the rule that a mortgagor is entitled to the rents and income from the mortgaged property for his own use until a receiver is actually appointed. St. Louis Union Trust Co. v. Wabash, C. & W. R. Co., 258 Ill. App. 9; Haugan v. Thorgersen, 270 Ill. App. 123; Levin v. Goldberg, 255 Ill. App. 62; Reynolds v. First Nat. Bank of Chicago, 279 Ill. App. 581.

It follows that the Madison-Kedzie bank is entitled to its pro rata share of the income prior to the appointment of a receiver unless, as plaintiff claims, there was a valid agreement by the Madison Square bank, as trustee under Trust No. 1009, to collect the rents for the benefit of the bondholders. The evidence offered to support such an agreement is vague and unsatisfactory. An employee of the Madison Square bank testified that he was instructed by Mr. Keenley, the president of the bank, to tell the bondholders that the bank was collecting the rents in the interest of the bondholders. One or two other witnesses testified to rather indefinite statements made by Mr. Keenley, who was also a member of the bondholders' committee.

In the recent case of Reynolds vs. First Nat. Bank of Chicago, supra, the bondholders' committee claimed certain rents upon the basis of an oral agreement between it and a representative of the equity owner. It was held that the oral agreement could not be sustained as, in order to create such a trust, it should be established by evidence unequivocal and unmistakable. Moreover, Trust No. 1009 specifically provides that the beneficiaries thereunder, namely, Geilen and Weber, were entitled to the rentals of the real estate and empowered the Madison Square bank as trustee under the trust to deal with the real estate only when authorized in writing by the beneficiaries. No power was given the Madison Square bank to encumber or pledge or otherwise dispose of the

the *Ruhner* case above referred to, the following cases support the rule that a mortgagor is entitled to the rents and income from the mortgaged property for his own use until a receiver is actually appointed. *Id. Lewis Union Trust Co. v. Kahnweh, C. & W. Co.*, 274 Ill. 493, 4; *Lamar v. Tarkington*, 276 Ill. App. 149; *Lemke v. Goldberg*, 295 Ill. App. 82; *Kennedy v. First Nat. Bank of Quincy*, 279 Ill. App. 73.

It follows that the Madison-Dearborn bank is entitled to the rents where of the income prior to the appointment of a receiver unless, on plaintiff's claim, there was a valid agreement by the Madison Square bank, to transfer under Sect. 1, 1, 1, to collect the rents for the benefit of the bondholders. The evidence offered to support such an agreement is vague and unsatisfactory. In employee of the Madison Square bank testified that he was instructed by Mr. Kennedy, the president of the bank, to tell the bondholders that the bank was collecting the rents in the interest of the bondholders. One or two other witnesses testified to rather indefinite statements made by Mr. Kennedy, who was also a member of the bondholders' committee.

In the recent case of *Kennedy vs. First Nat. Bank of Chicago*, supra, the bondholders' committee claimed certain rents upon the basis of an oral agreement between it and a representative of the equity owner. It was held that the oral agreement could not be substituted for, in order to create such a trust, it should be established by evidence unequivocal and unmistakable. Moreover, there is also evidentiary support that the bondholders (Dearborn, Kennedy, Gallon and Yager, were entitled to the rentals of the real estate and appointed the Madison Square bank as trustee under the trust to deal with the real estate only when authorized in writing by the bondholders. No power was given the Madison Square bank to encumber or pledge or otherwise dispose of the

rents of the real estate conveyed in the trust.

Plaintiff knew of the provisions of this trust as it alleged in its complaint the creation of the trust by the conveyance to the Madison Square bank as trustee.

We are of the opinion that the Madison Square bank, acting as trustee under Trust No. 1009, could not enter into any valid oral agreement or understanding with the plaintiff or with the bondholders' committee as to the disposition of the rents and profits from the premises which had been specifically assigned to it for the purpose of liquidating the indebtedness of the mortgagors to the respective banks.

After the Madison-Kedzie Trust and Savings Bank filed its intervening petition, William L. O'Connell was appointed its receiver, and leave was given to such receiver to prosecute the intervening petition of the bank; thereafter O'Connell's appointment as receiver was revoked and he was made the liquidating trustee of the bank and leave was thereupon given to such liquidating trustee to prosecute the intervening petition of the Madison-Kedzie Trust and Savings Bank in his own name as liquidating trustee.

We hold that William L. O'Connell, as liquidating trustee for Madison-Kedzie Trust and Savings Bank, is entitled to its pro rated share of the rentals received prior to the appointment of a receiver in the foreclosure proceedings, based upon the indebtedness of Geilen and Weber to that bank and the Madison Square State Bank.

The order is reversed and the cause remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

rents of the real estate conveyed in the trust.

Plaintiff knew of the provisions of this trust as it alleged in its complaint the creation of the trust by the conveyance to the Madison County Trust Co Trustee.

We are of the opinion that the Madison County Bank, acting as trustee under Trust No. 1007, could not enter into any valid oral agreement or understanding with the plaintiff or with the bondholders' committee as to the disposition of the rents and profits from the premises which had been specifically mortgaged to it for the purpose of liquidating the indebtedness of the mortgagors to the respective banks.

After the Madison-Madrid Trust and Savings Bank filed its interpleader petition, William A. O'Donnell was appointed receiver, and later the City of Madrid trustee to prosecute the interpleading petition of the Madison-Madrid Trust and Savings Bank in his own name as liquidating trustee.

We hold that William A. O'Donnell, as liquidating trustee for Madison-Madrid Trust and Savings Bank, is entitled to the same rights which of the rentals received prior to the appointment of a receiver in the interpleader proceedings, based upon the instrument of Dalton and Weber to that bank and the Madison County State Bank.

The order is reversed and the cause remanded for further proceedings consistent with what we have said in this opinion.

Reversed and remanded.

Matchett and O'Connor, JJ., concur.

38308

SARAH MINTON,
Appellee,

vs.

IRENE THOMPSON SMITH and MARGARET HAMAHR, doing business under the name and style of THE MINTON HAT CO. AND NOVELTIES,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a decree entered April 24, 1935, granting an injunction as prayed that defendants should desist from making use of the name "Sarah Minton" or "Minton" or "The Minton Hat Co. and Novelties" or "The Minton Hat Company and Novelties" or "The Minton Hat Co.", or the use of the word "Minton" in any form or style, or combination with other words or names, in connection with the business carried on by defendants, etc. The cause was before this court on a former appeal from an order which sustained the demurrer of defendants to the amended bill and dismissed the same for want of equity. Minton v. Smith, 276 Ill. App. 128. The allegations of the bill are there recited and need not be here repeated. We held that the court erred in sustaining the demurrer and dismissing the bill. The decree was reversed and the cause remanded for proceedings in accordance with the views expressed in the opinion.

The record shows that the cause was redocketed in the trial court August 28, 1934; that defendants filed their answer September 6, 1934, in which they averred that in November, 1930, plaintiff stated that she had decided to quit business for the rest of her life and offered her entire business for sale to them; that they accepted the offer; that they purchased from her the entire business including the trade name; that it was not until afterward that plaintiff indicated a desire to fix a time limit to their use of

the word "Winton"; that they never at any time agreed to be limited in the use of the trade name; that plaintiff's attorney drew the papers which they signed upon plaintiff's assurance that they correctly set forth the agreement; that in 1933 they ceased using this trade name and adopted as their own the trade name, "The Winton Hat Co. and Novelties," under which name they have since done business; that they were not then using and have not used for upward of one year plaintiff's trade name, "Winton"; that the location of their place of business has also been changed; that plaintiff is not in the millinery business, or any other business; that she has no intention of reentering the business and has taken no steps to that end; that there are numerous families in Chicago who use the surname "Winton"; that plaintiff has no exclusive right to the name and never had such right except as to the exact trade name adopted by her; that defendants are conducting a high-grade business in a manner which can cause no reflection on plaintiff; that plaintiff will not suffer any damages from their present use of the name, but to deprive defendants of its use will cause them great damage amounting to upwards of $1500 a year.

Plaintiff replied to the answer, admitting her alleged determination to retire from business, but denying the intention to quit and offer to sell, asserting that defendants did not purchase anything other than the fixtures and merchandise with right to use the name for a limited time, and that defendants agreed in writing to use the trade name "Winton" for one year only, as per copy of writing attached; denying that defendants were not using the name "Winton" but admitting that they use the name, "The Winton Hat Co. and Novelties"; admitting that plaintiff is not now in the millinery business, and that defendants' place of business is not the same as formerly; admitting that plaintiff is not now in the business and has taken no active steps to reopen such business, but denying any

fixed intention not to reenter; denying that she has knowledge of the number of persons in Chicago with the family name "Minton," but stating that she was the only person using the trade name "Minton" while she was in the millinery business; denying that she will not suffer damages; denying information as to the financial loss which would be caused to defendants by taking from them the use of the trade name, other than the loss of customers who still think plaintiff is interested in the business. She attached to her reply Exhibits "A" and "B", writings which it is argued tend to prove the allegations of her bill and her reply to the answer.

The cause was referred to a master, who reported finding the equities with plaintiff; that defendants had continued to use the trade name "Minton" after January 1, 1933, without permission of plaintiff, and without right to do so; that the matter had been theretofore litigated in this court, and that the opinion in the cause was the determining feature as applied to the facts; that the master had no alternative except to find "that the said Smith and Hamann are using the said name of 'Minton' without any legal or equitable right to do so."

The chancellor overruled exceptions to the report and entered a decree for an injunction as recommended.

Defendants urge nine points, with numerous citations of authorities, but as we view the case these points are fully covered by two - namely, that the findings of the court are contrary to the clear and manifest weight of the evidence, and, second, that the findings as a matter of law are insufficient to sustain the decree. As to this second contention it is sufficient to say that the questions of law must be regarded as settled adversely to defendants' contention upon the former appeal. This court is now bound to follow that decision as the law of the case. People v. Militzer, 301 Ill. 284; Dustin v. Brown, 303 Ill. 428; People v. Young, 309 Ill. 27;

fixed jurisdiction and to transport laborers that are but mechanics of the number of workers in California; for the family means "laborers," but applied that we can be sure; unless being the trade name "Chinese" while she was in the military business; leaving that we will not enter domestic; hoping intervention as if the financial been with work be unsent in relations by taking from them the use of the trade name, under that the list of exclusive was still under prohibition in the [illegible]. The minimum is not only an- "Article "A" and "B", matching which it is argued that to prove the allegations of the bill was not well to be answer.

The house was related in a matter, the repeated limiting the qualified with principally that relations had contained to not the trade name "Chinese" after January 2, 1915, without permission of plaintiff, as plaintiff right to do so; even the matter had been [illegible]. Defendants filed in this court, but that the opinion in the [illegible] was the determining factors an applied to the trade; that the [illegible] had no discretive court to find "name the only union and [illegible] are [illegible] the [illegible] "Chinese" without only legal or [illegible] right to do so."

The immediate varied requirements to the result not en- tered a decree for an injunction on [illegible].

Particularly such plain point, with however discussion of an [illegible], for we view the case there with the fully crossed by the [illegible], that the liability of the court was unnecessary to [illegible] clear and [illegible] right of the [illegible], and, hence, that the [illegible] as a matter of law are insufficient to sustain the [illegible]. The [illegible] indication it is sufficient to say that the [illegible] of law that [illegible] as applied materially to [illegible] [illegible] the [illegible] [illegible]. This [illegible] power to [illegible] that [illegible] the [illegible] [illegible]. Tongue v. Sullivan, 201 [illegible]

[illegible]: Martin v. Green, 102 [illegible], 404; Cronin v. Tobin, 201 [illegible], 17;

Morgenroth v. Pink, 227 Ill. App. 244; Trego v. Rubovits, 228 Ill. App. 389. The only question, therefore, open to consideration upon this appeal is whether the facts as found by the master and approved by the court are sustained by the evidence.

The evidence tends to show that plaintiff, who is nearly 70 years of age, entered into the millinery business about 50 years ago in Grand Rapids, Michigan; that she had first worked for her sister in Grand Rapids and afterward left there to come to Chicago, where she worked at the same business, first for Carson, Pirie, Scott & Co. and afterward for other persons; that in 1920 she opened her own business in the Drake hotel, where she continued until about December 31, 1930. Her business was conducted under the name "Minton," which appeared on the door and the stationery and billheads. It was a high priced store, and her business being mostly personal was obtained largely by advertising through cards sent out. Defendant Irene Smith worked for plaintiff about eleven years and afterward for a year at the Drake hotel. She is experience in the millinery business. Defendant Margaret Hamann was employed by plaintiff in her business at the Drake hotel for nine years. In October, 1930, the lease of the premises having been given to some one else, and plaintiff being in ill health and wishing to give up her activities in the business, negotiations were opened up by her with defendants which resulted in their entering into a written agreement, November 10, 1930, which appears in evidence as "Complainant's No. 2," and which is as follows:

"Misses Irene Thompson Smith and
Margaret Hamann
Chicago, Ill.

Ladies:

If you open a millinery business at 634 North Michigan Avenue, on or about January 1, 1931, as you are now contemplating doing, I am willing to permit you to use the trade name 'Minton' so as to assist you in obtaining customers, for one year from January 1, 1931. Thereafter, I will decide about cancelling the privilege or extending

[illegible] Y. Tsai, MT [illegible] Mr. [illegible] Tsai v. Martin, Mr. [illegible]

Mr. [illegible] The full question, however, upon the preliminary [illegible] upon this ground is whether the facts as found by the master and approved by the court are supported by the evidence.

The evidence tends to show that plaintiff, who is nearly 70 years of age, worked into the military business about 20 years ago in Hong Kong. Afterward, but the [illegible] [illegible] where he worked at the same business, first as [illegible], Flint, Smith & Co., and afterwards for other persons; but in 1911 he opened his own business in the Hong Kong hotel, where he continued until about December 31, 1916. Her business was conducted under the name "Hinson," which appeared on the door and the stationery and billheads. It was a fully licensed house, and her business being mostly personal was attended largely by observing through [illegible] some one. Defendant lives with wife and [illegible] years and afterward for a year at the Hong Kong hotel. She is employed in the military business. Defendant testified that she worked by plaintiff in her business at the Hong Kong hotel for nine years. In October, 1916, the lease of the premises having been given to some one else, her plaintiff being in ill health and wishing to give up her activities in the business, negotiations were opened up by her with defendants which resulted in their entering into a written agreement, December 10, 1916, which marks is written as "Exhibit's No. 2," and which is as follows:

"Hinson Tsai Chinese Cafe and
Restaurant Lease
Oakland, Cal.

Lessor:

If you open a military business at 464 Eighth street, Oakland, or at about January 1, 1917, as you are now contemplating doing, I am willing to permit you to use the trade name 'Hinson' on as much of your in obtaining customers, for one year from January 1, 1917. Therefore, I will refrain about commencing the building or carrying

the time, as the case may be. You are not to obligate me in any way on account of the fact that I permit you to use the trade name.

Yours truly,
(Signed) Sarah Minton.

We agree to the above.
(Signed) Irene Thompson Smith
(Signed) Margaret Mamann."

December 22, 1930, a writing was executed by defendants, which appears in evidence as "Complainant's Exhibit No. 1." It is in the handwriting of ~~one of the defendants~~, is addressed to plaintiff and states that complainant has sold to defendants certain fixtures "at a price of $1,800.00 Dollars as follows: Cash $800.00 Dollars down, the balance of $1,000.00 Dollars we agree to pay at the rate of $50.00 Dollar per month until fully paid."

The premises theretofore used by plaintiff had been leased to another. Defendants could not obtain a lease suitable to their purposes at another place without an established name. For the purpose of assisting, plaintiff gave defendants a letter to deliver to their prospective landlord to the effect that she had given them the right to use her name. The lease was obtained at 634 North Michigan avenue. Unsold merchandise belonging to plaintiff was moved to the new location and was afterward purchased and used by defendants. Plaintiff was in the store of defendants for a part of the day during three or four days of each week in 1931, and helped to wait on her former customers. As the expiration of the year approached there were further negotiations relative to the further use of the trade name, and the parties finally reached an agreement by which plaintiff sold the balance of her stock to defendants and agreed that they might use the trade name for one year from January 1, 1932. The terms seem to be fully stated in a memorandum dated January 18, 1932, and addressed to defendants, which is as follows:

"In consideration of Five Hundred and Seventy-five Dollars ($575.00) in hand paid, I hereby sell to you the balance of my stock of millinery merchandise and trimmings located in your place of business at 634 North Michigan Avenue, Chicago, Illinois, and I

[illegible] Sincerely,

(Signed) Alfred Bratton.

Yr enclosure to the above.

(Signed) Irene Jacobson (Mrs)

(Signed) Secretary General.

Therefore Dr. Ritchie, a written vow exercised by Bakersfield, which appears to relinquish an "unconditional Monthly Rel. I." is in the underwriting of commercial-underwriters, is directed to principal and states that commercial had sold to Bakersfield certain fixtures "at a price of $3,[illegible] dollars to Bakersfield" that Mr. Jacobson [illegible] the balance of $3,[illegible] dollars be [illegible] at the rate of $[illegible] per month until fully paid."

The premises [illegible] used by plaintiff had been leased to another. Defendants would not admit a lease suitable to their purposes at similar place without an additional [illegible]. For the purpose of [illegible], plaintiff quit defendants a letter to deliver to their representative [illegible] to the effect that [illegible] the right to use the [illegible]. The letter was delivered at the [illegible] Bratton [illegible]. Shortly afterwards [illegible] plaintiff was moved to the new location and was [illegible] used by defendants. Plaintiff was in the place of defendants for a part of the day during three or four days of each year in 1[illegible], and hoped to sell to her former customers. In the negotiation of the [illegible] were [illegible] pertinent [illegible] to the [illegible], and the parties finally reached an agreement by which plaintiff sold the fixtures of her stock in [illegible] and agreed that she might use the front room for one year from January 1, 1[illegible]. The [illegible] to be fully stated in a memorandum dated January 14, 1[illegible], and addressed to defendants, which is as follows:

"In consideration of five dollars and [illegible] ($5.00) in hand paid, I hereby sell to you the fixtures at my place of millinery establishment and [illegible] to your place of business at 604 North Michigan Avenue, Chicago, Illinois, and I

agree that you may have the use of my trade name of "MINTON" for one (1) year from January 1, 1932, or, if you do not use the name for trade purposes, I agree that I will not use it in business, or engage in the millinery business during the year 1932 in Chicago, Illinois.

(Signed) Sarah Minton."

There is evidence tending to show that defendants at this time proposed to buy the right to use the trade name, but plaintiff informed them that it was not for sale. November 26, 1932, plaintiff caused a letter to be sent to defendants, asking them not to use the name after January 1, 1933. Defendants did not entirely discontinue the use of the name "Minton" after that time but began the use of the name in combination with other words. On the door they put the words, "The Minton Co. and Novelties"; on their billheads, the words "The Minton Co." followed below by the words "Millinery and Novelties, Women's Athletic Club Bldg., 634 No. Michigan Avenue, Chicago."

Plaintiff testified that she "may" go into the millinery business again, but that she had not picked out a store or signed a lease. She said she did not have any particular location in mind; that her health has improved, and while she is getting along, she thinks she ought to work for a living, and that she is now able to reenter the millinery business; that she has been living on prior earnings for four years; that she does not know whether she can pay living expenses for the next five years without working.

Plaintiff offered no evidence tending to show the amount of actual loss sustained through the use of her name by defendants. Her attitude as to starting in business is indicated by the following colloquy:

"Mr. McCormack (attorney for defendants): Well, Miss Minton, when do you plan to start in business?

A. When I make up my mind to.

Q. When do you think you will make up your mind to start in business? A. Very soon.

Q. When will that be?

A. I could not tell you definitely when or where or anything about it. It is very soon though.

Plaintiff testified that she "may" go into the military business again, but that she had not signed out a store to signed a lease. She said she did not have any particular location in mind; that her health had improved, and while she is getting along, she thinks she ought to try for a living, and that she is now able to resume the military business; that she has been living on paid earnings for four years; that she has not been drawing her pay living expenses for the past five years without working.

Plaintiff offered no evidence tending to show the amount of actual loss sustained through the use of her name by defendants. Her attitude as to whether or not she was injured by the defendants' acts is evidenced by the following colloquy:

"Mr. Robinson (attorney for defendants): Well, Miss Hinton, when do you plan to start in business?

A. Just as soon as we can get ready.

Q. Just as you think you will make up your mind to start in business? A. Very soon.

Q. Then you will that be?

Q. I guess you felt your defamatory name or words or anything, anyway it, it is not worth thought.

Q. Where do you plan to start in business?
A. Chicago.
Q. Well, in what part of Chicago?
A. That I haven't decided."

She also said that her credit was established for years; that the firms with which she had done business would advance her any amount of credit she might wish. She thought that whatever the amount was necessary, whether large or small, she could easily get. She also said that she had never asked anybody to take the business over; that she paid $2,500 for her fixtures, but in June, 1930, she had an offer of $5000 for the business, which she refused. There was a sign in the window offering the fixtures for sale for two months before defendants purchased them.

The exceptions of defendants raised questions as to whether the evidence sustained the finding that plaintiff decided to quit the business only until some future time, whether defendants purchased the business with the fixtures, whether defendants continued to use the name "Minton" after January 1, 1933, whetherat the beginning of the transactions with defendants, plaintiff had determined to quit the millinery business permanently, whether defendants purchased the entire business at that time and the use of the name was an afterthought, as well as a question as to the failure of the master to find that there were many persons in the Chicago Telephone Directory named "Minton." The most important question raised by these exceptions is, of course, whether there should have been a finding that plaintiff sold and defendants purchased the entire business. There was some evidence to that effect (but it was denied by evidence equally credible), and it is wholly inconsistent with the written evidence and entirely improbable in view of all the facts and circumstances which appear in the case. We have given careful consideration to each of the exceptions. We think it was not reversible error to overrule any one or all of them. The master found that the evidence sustained the allegations of the bill as

Q. Where do you plan to start in business?
A. Detroit.
Q. Well, do you know of anyone?
A. Just I know's Detroit.

The also made that her divorce was established for proof; that the first six years, she and her husband were married after her husband's death of heart disease, which is large or small, one would really get. She also said that she had never lived elsewhere in her lifetime except that she paid $5,000 for her divorce, but in June, 1970, she had an offer of $2000 for her husband's rights in Detroit. There was a sign in the window offering the Chevrolet for sale for the asking price.

The testimony of Defendant Dallas Lightfoot is in stark contrast to the evidence presented by the plaintiff. Lightfoot denies to visit the business only twice from Tower time, without electronic pay-phone the business also the Chevrolet, the car belonging mentioned to use the name "Sixteen" after January 1, 1978, without the knowledge of the transactions with Defendants, plaintiff and defendant. In spite the existing business relationship, without defendants pay-phone the entire business on back item and the use of the car. Now an alternative, as well as a question as to the liability of the owner to that this there were many persons in the Chevrolet Sixteen-Sixty-seven "Sixteen." The best Eastwood question raised by Dave concerning by, of course, another owner should have been a Plaintiff that already sold and Defendants purchased the entire business. There was more evidence to show other than it was taking by Dave Monte quality structure, but it is mainly inconsistent with the written testimony and entirely improvised in view of all the facts and circumstances which occurred in the case. To have given credit consideration to some of the conversations. To which it was the reasonable effect to conclude any one or all of them. The major fact that the witness evaluated the eligibility of the bill as

amended. The chancellor has approved the findings. We are not able to say that the findings are clearly against the weight of the evidence, and the issues of fact therefore must be found in favor of plaintiff. The question of law was considered on the former appeal. We then adjudged that the bill as amended stated a good cause of action. We are now of that opinion, notwithstanding the voluminous brief upon law questions presented by defendants. The previous decision is the law of this case to which we adhere.

The decree is therefore affirmed.

AFFIRMED.

McSurely, P. J., concurs.

O'Connor, J., specially concurring.

In view of the rule of law announced in the majority opinion on the former appeal which established the law of the case, I concur.

[illegible]. The [illegible] the [illegible]. We are not [illegible] in any case the [illegible] are [illegible] against the [illegible] of the [illegible]. All the issues of fact therefore must be found in favor of plaintiff. The question of law was considered on the former appeal. We then stipulated that the bill as amended stated a good cause of action. We are now of that opinion, notwithstanding the motionous brief upon the questions presented by defendants. The statutes involved in the law of this case is which, we believe.

The theory is [illegible] effected.

[illegible].

[illegible], J., [illegible].

[illegible], J., [illegible] [illegible].

In view of the rule of law announced in the majority opinion [illegible] the [illegible] appeal [illegible] the law at the [illegible], I [illegible].

38337

BAKER WALSH & COMPANY, a Corporation,

vs.

ILLINOIS NATIONAL CASUALTY CO., a Corporation, T. H. REITER and O. E. WINZER.

T. H. REITER, a Defendant and the Counterclaimant,
Appellant,

vs.

ILLINOIS NATIONAL CASUALTY COMPANY, a Corporation, O. E. WINZER, BAKER WALSH & COMPANY, CLAUDE H. BARR, ARTHUR M. FITZGERALD, ERNEST PALMER, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Defendants to Counterclaim,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by T. H. Reiter from a decree entered May 20, 1935, dismissing his counterclaim without prejudice.

On May 24, 1934, Baker Walsh & Co. filed in the Circuit court of Cook county a suit against Reiter, O. E. Winzer and the Illinois National Casualty Co., upon demand for an alleged balance of $7035.50, claimed to be due on account of securities sold and delivered. The Casualty Co. and Winzer answered denying liability. Reiter filed a demand for jury and obtained an order giving leave to file a counterclaim. The counterclaim named as defendants thereto the Illinois National Casualty Co., O. E. Winzer (already defendants), Baker Walsh & Co. (already plaintiff) Claude H. Barr, Arthur M. Fitzgerald, Ernest Palmer and Fidelity & Deposit Co., who were made additional parties. The counterclaim consists of 72 paragraphs and is voluminous in character. It sets up in detail dealings between Reiter and defendants, and avers that Reiter in the year 1918 was the directing head of a reciprocal automobile

This is an appeal by I. S. Salter from a decree entered May 20, 1915, dismissing his counterclaim without prejudice.

On May 24, 1912, Baker Walsh & Co. filed in the circuit court of Cook county a suit against Salter, G. E. Ginger and the Illinois National Guaranty Co., upon bonds for an alleged balance of $7032.80, claimed to be due on account of securities sold and delivered. The Guaranty Co. and Ginger answered denying liability. Salter filed a demand for jury and obtained an order giving leave to file a counterclaim. The counterclaim named as defendants thereto the Illinois National Guaranty Co., G. E. Ginger (already defendants), Baker Walsh & Co. (already plaintiff) Glenn G. Bates, Arthur E. Fitzgerald, Sweet Palmer and Kimball & Dupont Co., who were made additional parties. The counterclaim consists of 72 paragraphs and is voluminous in character. It sets up in detail dealings between Salter and Defendants, and avers that Salter in the year 1912 was the directing head of a reputed automobile

casualty insurance exchange which prospered; that Winzer, an accountant, was his sole financial adviser from and after 1930; that in July, 1930, they organized the Illinois National Casualty Co. with capital stock of $200,000 and a surplus of $40,000, and thereafter the U & I Service Corporation, with capital stock of $5000, to act as agency for the Casualty Co.; that in 1931 the Eastern Underwriters Corp., with principal office in Springfield, Illinois, was organized for the purpose of acting as attorney-in-fact for a reciprocal exchange, known as Eastern Automobile Insurance Underwriters; that the controlling stock of the Eastern Underwriters Corp. was owned and held by Claude H. Barr; that Winzer also performed services as an accountant and auditor for these corporations; that in March, 1931, Winzer began negotiations, which resulted in a verbal agreement (to which Barr, Winzer and Reiter were parties) known as the Exchange Agreement, whereby the business of the Exchange was to be taken over by the Casualty Co. and the interest of the stockholders of the Eastern Underwriters Corp., the attorney-in-fact for the Exchange, was acquired; that the problem was complicated and it was impossible to at once agree upon details; that Winzer was to give his time to such details; that April 9, 1931, a corporation known as the Finance & Investment Co., with offices at 29 South LaSalle street, was organized to own and control the capital stock of the Casualty Co., and its affiliates; that Reiter was to own 55 per cent of the stock; Winzer 5 per cent and Barr 40 per cent of the stock; that Barr never invested cash in the Casualty Co. prior to May 12, 1933; that he owned 130 of 250 shares of the capital stock of the Eastern Underwriters Corp., which by the verbal exchange agreement was to be exchanged for the stock of the Casualty Co. at the ratio of one to fifteen; that up to May 12, 1933, Barr had invested $29,250 under the exchange agreement and was entitled to 1950 shares of the stock of the Casualty Co., while Reiter had invested therein

commonly insurance exchange which prevented; that Winner, in accordance, was his own financial adviser from and after 1920; that in July, 1921, they organized the Illinois National Casualty Co. with capital stock of $200,000 and a surplus of $61,000, and thereafter had a full service corporation, with capital stock of $200,000 as a money for the company Co.; that in 1922 the Eastern Casualty Co., with principal office in Springfield, Illinois, was organized for the purpose of acting as attorney-in-fact for a reciprocal exchange, known as Eastern Automobile Insurance Exchange; that the controlling stock of the Eastern Underwriters Corp. was owned and held by Oliver F. Barr; that Winner also performed services as an accountant and auditor for these corporations; that in March, 1923, Winner began negotiations, which resulted in a verbal agreement (to which Barr, Winner and Reiter were parties) known as the Exchange Agreement, whereby the business of the Exchange was to be taken over by the Casualty Co. and the interest of the stockholders of the Eastern Underwriters Corp., the attorney-in-fact for the Exchange, was acquired; that the problem was complicated and it was impossible to do more than outline; that Winner was to give his time to such details; that April 9, 1924, a corporation known as the Illinois Investment Co., with offices at 33 South Dearborn street, was organized in Ohio and entered into capital stock of the Casualty Co., and its activities; that matter was to own 51 per cent of the stock; Winner 8 per cent and Barr 41 per cent of the stock; that Barr never invested cash in the Casualty Co. Prior to May 13, 1923; that he owned 180 of 300 shares of the original stock of the Eastern Underwriters Corp., which by the typical exchange agreement was to be exchanged for the stock of the Casualty Co. at the ratio of one to fifteen; that up to May 13, 1923, Barr had invested $30,000 under the exchange agreement and was entitled to 1800 shares of the stock of the Casualty Co., while Reiter had invested twenty

$234,800; that the stock of the Eastern Underwriters Corp. was acquired by the Holding Co.; that thereafter the Equitable Adjustment Co., a corporation, with its principal office in Chicago, was organized to conduct the business of adjusting losses occurring in the business of the Casualty Co.; that under the exchange agreement Reiter devoted himself to the promotion of these corporations and was the president of the Casualty Co., while Barr devoted himself principally to the development of the new business and while Winzer, as accountant and auditor, looked after the securities of these various corporations; that in November, 1932, Barr became dissatisfied; that Reiter had advanced money in the interest of these concerns, on account of which he became indebted in various institutions to the extent of $70,000; that it had been agreed that this indebtedness should be assumed by the Holding Co?; that among those to whom he was thus indebted was plaintiff, Baker Walsh & Co.; that the Casualty Co. owned a mortgage on real estate in Springfield known as the Mausoleum Mortgage, which the Insurance Department asked should be replaced with other securities; that Winzer withdrew the mortgage from the assets of the Casualty Co. and deposited the same as an asset of the Holding Co.; that the substituted securities were satisfactory to the insurance department, and that a part of these were the securities which were purchased from plaintiff (and for the purchase price of which plaintiff sues in this case); that in December, 1932, an examination of the Casualty Co. was made under the direction of Ernest Palmer, Superintendent of Insurance of Illinois, which showed the Casualty Co. with a surplus of $32,000; that the company at no time owned U. S. Liberty bonds; that Barr, Winzer and Reiter in February, 1933, at Chicago, discussed the annual statement to be prepared for the meeting of the stockholders that year, and that Barr at that time suggested that the statement should show some U. S. Liberty bonds; that Reiter heard nothing further of the matter until May 8, 1934; that about February

$250,000; that the stock of the various underwriters were acquired by the holding Co.; that thereafter the Liberty Adjustment Co., a corporation, with its principal office in Chicago, was organized to conduct the business of adjusting losses occurring in the business of the Guaranty Co.; that after the exchange agreement Butler devoted himself to the promotion of these corporations and was the president of the Guaranty Co., while Burr devoted himself principally to the development of the new business and with Vinzer, as accountant and auditor, looked after the securities of these various corporations; that in November, 1923, Burr became dissatisfied; that Butler had advanced money in the interest of these companies, on account of which he became indebted in various liabilities to the extent of $70,000; that it had been agreed that his indebtedness should be assumed by the holding Co.; that among those to whom he was thus indebted was plaintiff, Baker Walsh & Co.; that the Guaranty Co. owned a mortgage on real estate in Springfield known as the Executive Building, which the Executive Department rented from the trustees with other securities; that Burr wrote the mortgage from the assets of the Guaranty Co. and deposited the same as an asset of the Holding Co.; that the substituted securities were satisfactory to the insurance department, and that a part of these were the securities which were purchased from plaintiff (and for the purchase price of which plaintiff sues in this case); that in December, 1924, on examination of the Guaranty Co. was made under the direction of Ernest Palmer, Superintendent of Insurance of Illinois, which showed the Guaranty Co. with a surplus of $22,000; that the company at no time owned G. E. Liberty Bonds; that Burr, Vinzer and Butler in February, 1921, at Chicago, discussed the annual statements to be prepared for the meeting of the stockholders that year, and that Burr at that time suggested that the statement should show some G. E. Liberty bonds; that Butler heard nothing further of the matter until day [illegible], 1924; that about February

28, 1933, Winzer handed to Reiter a form for the annual statement to be filed with the Insurance Department on March 1st; that Winzer, as usual, prepared the report; that Reiter signed the same before it was completed, it having been previously signed by the secretary; that Reiter signed it in the belief that it would show the true condition of the company; that the report called for a statement of the condition of the company as of December 31, 1932; that on May 8, 1933, an examiner of the Insurance Department called at the office of the Casualty Co. and asked leave to examine the $15,000 worth of U. S. Liberty bonds; that Reiter then for the first time learned that the statement filed contained such an item; that he was summoned by Palmer to appear at the office of Palmer in Springfield on the following day; that he did so appear before Palmer, where he found Barr and his counsel, Fitzgerald, and the secretary of the Casualty Co.; that defendant was interrogated in a hostile way and was ordered to raise $100,000 in two days; that on May 13th he again appeared and informed Palmer that he had not raised this money, when he was informed that he would be divested of the control and management of the Casualty Co.; that he was intimidated by a suggestion of charges of criminal conduct, which was untrue; that Palmer on May 12, 1933, took over the control of the company, and that Fitzgerald became a stockholder and director of it; that on May 13, 1933, Barr and Palmer came to Chicago from Springfield and dispossessed Reiter and took charge of the Casualty Co. and its affiliates; that a pretended consolidation was arranged with the U. S. Underwriters Co. of Jacksonville, Ill.; that the whole scheme was fraudulent and the result of the conspiracy; that certain of Reiter's stocks had been deposited as collateral with the banks to whom he was indebted, and Palmer caused the banks to be notified not to deliver the stock to anyone without Palmer's consent; that Palmer required and received an assignment of

26, 1941, Fisher failed to deliver a firm for the annual statement to be filed with the Insurance Department on March 1st; this Fisher, as usual, reported the report; that Butler signed the same before it was completed, it having been previously signed by the secretary; that Butler signed it in the belief that it would give the true condition of the company; that the report called for a statement of the condition of the company as of December 31, 1940; that on May 8, 1941, an examiner of the Insurance Department called at the office of the Security Co. and asked Levy to examine the $15,000 worth of U. S. Liberty bonds; that Butler then for the first time learned that the otherwise fine insurance man, in fact, had he assumed by Fisher to appear as the office of Fisher in Springfield on the following day; that he did so under belief Fisher, where he found Fisher and his counsel, Fitzgerald, and the secretary of the Security Co.; that Butler was interrogated in a hostile way and was ordered to raise $150,000 in two days; that on May 12th he again appeared and informed Fisher that he had not raised this money, that he was informed that he would be diverted of the control and management of the company Co.; that he was intimidated by a suggestion of surrender of existing control, which was mixture; that Fisher on May 12, 1941, took over the control of the company, for that Fitzgerald became a president and director of it; that on July 12, 1941, Levy and Fisher met in Chicago from Springfield and discussed Butler and took control of the Security Co. and its affiliates; that a practical consolidation was arranged with the U. S. Underwriters Co. of Indianapolis, Ill.; that the whole scheme was fraudulent and the result of the conspiracy; that certain of Butler's claims had been supplied as evidence with the bonds so soon as was indicted, and Fisher caused the bonds to be entitled not to deliver the above to support Fisher's consent; that Fisher received and received an agreement of

Reiter's stocks upon an agreement that Barr and Winzer would make a like assignment of their stocks; that Palmer took over these assets in a fiduciary capacity; that Palmer pursuant to a well-devised plan proceeded to have the affiliated companies dissolved; that 22,000 shares of the capital stock of the Holding Co. were delivered to Palmer by Reiter, Reiter believing that the only obligation of the Holding Co. was this obligation to him under the exchange agreement; that the consolidation of the Casualty Co. with the U.S. Underwriters Co. of Jacksonville, Ill., under the direct control of Palmer, and the meetings held were under the guidance of Palmer, Barr and Fitzgerald; that Palmer permitted Barr, Fitzgerald and Cecil L. Morris, former secretary, to operate the Casualty Co. and its affiliates during his period of control, and that they became heads of the business in the reorganized corporation under the supervision of Palmer; that the reorganized corporation is still operated by them; that Palmer permitted the banking corporations holding stock as collateral to the obligations of Reiter to dispose of the same under power of sale in the collateral agreement by payment of the amount of actual loans of about $7100, and that Palmer arranged for the disposal of this stock to Barr and Fitzgerald, with whom he conspired to that end, contrary to his fiduciary relationship; that Reiter executed the documents relying on the integrity of Palmer in an endeavor to cooperate in the reorganization in the interests of the stockholders; that Reiter invested in the stock of the Casualty Co. in July, 1930, in cash and securities in excess of $234,800; that in 1931 and 1932 the Casualty Co. disclosed an income of more than $80,000 over and above its disbursements, and at no time failed to pay valid claims; that its net worth was conservatively estimated to be at least $123,000, which was the value placed on it for the purposes of merger; that Palmer, or his associates, have converted the same to their own use and disposed of the in-

Reiter's claims upon an agreement that Barr and Wimmer would make a like negotiation of understanding; that Palmer been over these needs in a fiduciary capacity; that Palmer pertained to a well-devised plan presented to Barr for affiliated companies discussed; that $2,000 shares of the capital stock of the holding co. were delivered to Palmer by Reiter, Reiter believing that the only obligation of the holding co. was this obligation to him under the contract agreement; that the shareholders of the Security Co. with the U.S. Mineral's Co. of Louisville, Ky., under the direct control of Palmer, and the meetings held were under the guidance of Palmer, Barr and Stagerald; that Palmer appointed Barr, Stagerald and Cecil R. Morris, former secretary, to operate the Security Co. and its affiliates during his period of control, and that they became heads of the Delaware to the reincorporated organization under the supervision of Palmer; that the reorganized corporation is still located by them (the Palmer group) at the Parkway Building block as contrasted to the obligations of Reiter in Palmer of the same water power of value in the affiliated companies by payment of the amount of actual loans of about $72M, and that Palmer arranged for the dismissal of this attack to Barr and Stagerald, with whom he conspired to that end, contrary to his fiduciary relationship; that Reiter accepted the documents relying on the integrity of Palmer in an endeavor to concentrate in the reorganization in the interests of the stockholders; that Reiter invested in the stock of the Security Co. in July, 1930, in good and sufficient in excess of $234,000; that in 1931 and 1932 the Security Co. disclosed an income of more than $50,000 over and above its disbursements, and at no time failed to pay their dividend; that its net worth was substantially estimated to be at least $[illegible], and was the value placed on it for the purpose of Reiter; that Palmer, or his associates, have converted the same to their own use and elements of the in-

terests of Reiter without due process of law and in disregard of his constitutional rights; that they have acted contrary to their fiduciary duty in allowing property of the value of $60,000 to be taken for $7100; that the pretended threats, charges, etc., made against Reiter were for the purpose of coercing and intimidating him to consent to the scheme of Palmer and his associates; that Palmer denies his liability to account; that since May 12, 1933, he and his associates have assumed an attitude reflecting on the integrity and credibility of Reiter, secretly trying to destroy his reputation; that the Fidelity & Deposit Co. of Maryland, as surety for Palmer on his official bond, is liable for any loss the counterclaimant has sustained by reason of the premises.

Complainant prays for summons and for answer; that Palmer and his agents, who are in possession of the stocks and proceeds, be directed to deliver same to counterclaimant; that Palmer, Barr, Fitzgerald, and Winzer be enjoined from disposing of the property and the Illinois Casualty Co., and from disposing of any of the stock of said defendants; that the Casualty Co. may disclose a complete list of stockholders as of May 12, 1933, November 1, 1933, and December 31, 1934, and also disclose the financial statement upon which it was consolidated with the U. S. Underwriters Co., as well as the manner in which it acquired title to the Mausoleum mortgage, and that counterclaimant may have other and further relief, as discoveries made and the trial in conformity with the Civil Practice Act may disclose him to be entitled to; that the Fidelity & Deposit Co. of Maryland also disclose the contract or bond entered into by it in behalf of Palmer, and that judgment may be entered against the Fidelity & Deposit Co. of Maryland for such amount as may be found due and owing, and "that this Court after said answers are filed and the facts are disclosed by discovery, or otherwise in this matter, ascertain what portions of said cause belong to equity, if any, and what portions of said cause belong to law, if any, and

[illegible] of Junior Alumni the privilege of law and in discharge of his constitutional rights; that they have acted contrary to their fiduciary duty in allowing property of the value of $80,000 to be taken for $7,000; that the pretended lawsuits, charges, etc., made against Walker were for the purpose of covering and intimidating him to consent to the scheme of Palmer and his associates; that Palmer denies his liability to account; that since May 12, 1921, he and his associates have assumed an attitude reflecting on the integrity and credibility of Walker, secretly trying to destroy his reputation; that the Fidelity & Deposit Co. of Maryland, on surety for Palmer on his official bond, is liable for any loss the complainant has sustained by reason of the premises.

Complainant sues for accounts and its master; that Palmer and his agents, who are in possession of the books and records, be directed to deliver same to complainant; that Palmer, Sherwood, and Ginger be enjoined from disposing of the property and the Illinois Casualty Co., and from disposing of any of the stock of said defendants; that the Casualty Co. may disclose a complete list of stockholders as of May 17, 1918, November 1, 1922, and December 31, 1921, and also disclose the financial statement upon which it was consolidated with the U. S. Guarantee Co., as well as the manner in which it received title to the Lincoln Hotel property, and that counterclaimant may have other and further relief, as discovery made and the trial in conformity with the Civil Practice Act may disclose his to be entitled to; that the Fidelity & Deposit Co. of Maryland also disclaims the contract or bond entered into by it in behalf of Palmer, and that judgment may be entered against the Fidelity & Deposit Co. of Maryland for such amount as may be found due and owing, and "that this Court may grant such further and other relief as the facts may disclose to be just and equitable in the premises, as although the complaint of said Walker may be right, if any, and that attorneys of said Walker be fined in law, if so, and

such portions as may belong to law may be tried by a jury as demanded by this defendant."

Summons was issued and served on the Illinois National Casualty Co., on Claude N. Barr, its president, with personal service on Claude N. Barr, A. E. Fitzgerald and Ernest Palmer. Palmer, Fidelity & Deposit Co., Barr and Fitzgerald each entered a special and limited appearance for the sole purpose of questioning the jurisdiction of the court, and each moved the court that the answer and counterclaim be dismissed, and as grounds therefor showed that the court was without jurisdiction of counterclaim; that it had no jurisdiction of the subject matter of the answer and counterclaim; that the subject matter of the answer and counterclaim was not germane to the subject matter of the original declaration and was not properly filed as a counterclaim thereto. We have set up the counterclaim in extenso that the situation confronting the court may appear.

Upon hearing the counterclaim was dismissed, as heretofore stated.

It is contended by the counterclaimant in the first place, that the decree should be reversed because the motions to dismiss did not comply with the provisions of the Civil Practice Act, or the rules of court. Section 45, paragraphs 1 and 2, chapter 110, (Ill. State Bar Stats. 1935, p. 2444) and Rule 16 of the Supreme court with reference to the presentation of motions are called to our attention. Section 45 provides, in substance, that all objections to pleadings heretofore raised by demurrer shall be raised by motion, and that motion shall point out specifically the defects complained of and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action, or the entry of a judgment where a pleading is substantially insufficient in law. Section 7 of Rule 15 of the Circuit court of Cook county provides, in substance, that all motions when founded upon matters of fact not

[illegible] motions or for [illegible] to trial by a jury is demanded by this [illegible].*

Counsel's [illegible] have served on behalf of the Illinois National Insurance Co., an Illinois corporation, its president, vice-president, secretary and [illegible] Burr, L. G. Fitzgerald and [illegible] Fisher, Fisher, Fisher & Dwyer, Co., Burr and Fitzgerald have entered a special and limited appearance for the sole purpose of quashing the jurisdiction of the court, and made moral the court that the service and [illegible] be quashed, and be granted injunctive relief that the court may without jurisdiction of counterclaim; that is not the jurisdiction of the subject matter of the answer and counterclaim; that the subject matter of the answer and counterclaim was not germane to the subject matter of the original declaration and was not properly filed as a counterclaim therein. The facts set up the counterclaim in [illegible] that the plaintiff [illegible] the court may answer.

Upon hearing the counterclaim was dismissed, as [illegible] [illegible].

It is contended by the counter-claimant in the first place, that the decree should be reversed because the motion to dismiss did not comply with the provisions of the civil practice act, or the rules of court. Section 45, paragraphs 1 and 2, Hurdle's Ill. Stats. for 1923, p. 3040) and rule 12 of the circuit court with reference to the presentation of motions are called in our attention. Section 45 provides, in substance, that all objections to pleadings heretofore raised by demurrer shall be raised by motion, and that motion shall point out specifically the alleged insufficiency of and shall set forth in such field as the nature of the defects may make ascertainable, such as the dismissal of the action, or the entry of a judgment upon a pleading in substantially insufficient in law. Section 7 of Rule 12 of the circuit court of Cook County provides, in substance, that all motions from pleaded upon matters of fact must

appearing of record in the cause shall be supported by affidavit or affidavits of such matters, a copy of which affidavit or affidavits shall be served with the notice of the motion. Rule 16 of the Supreme court provides that where, in a proceeding for a summary judgment, defendant files a counterclaim against plaintiff, the court, if it is of the opinion that there is merit in defendant's counterclaim, may reserve action until all issues in the case have been determined, or may enter summary judgment for plaintiff and stay execution upon such judgment until such time as the issues upon the counterclaim are decided, etc.

No affidavit or affidavits were submitted by counter-defendants in support of their respective motions, and counterclaimant contends that the decree of the Circuit court should be reversed for this reason.

The use of the motion to dismiss, instead of the demurrer, was not unknown to the practice in this State before the adoption of the present Civil Practice Act. (Burnett v. Mutual Life Ins. Co., 268 Ill. App. 518). We think the same rules in general are applicable now as then. Facts which appear upon the record of the court are not required to be supported by affidavit, since the court by its record is sufficiently informed. All matters which do not appear upon the face of the proceedings must be so supported, and we are inclined to the opinion that under Section 45 of the Civil Practice Act the motions submitted in behalf of defendants might well have been more specific in their nature, and that some of the points (now apparently raised in the Appellate court for the first time) should have been supported by affidavit, if it had been the intention of defendants to rely thereon. Such, for instance, is the situation with reference to their contention that the motions to dismiss should be sustained because the defendants to the counterclaim were sued out of their proper counties. The mere fact that Barr, Fitzgerald, Palmer and the

supporting of record in the case shall be supported by affidavit or affidavits of some witness, a copy of such affidavit or affidavits shall be served with the notice of the motion. Rule 1; of the Supreme Court provides that there, in a proceeding for a summary judgment, defendant files a counterclaim against plaintiff, the court, if it is of the opinion that there is no triable issue in defendant's counterclaim, may reserve action until all issues in the case have been determined, or may enter summary judgment for plaintiff and stay execution upon such judgment until such time as the issues upon the counterclaim are decided, etc.

In affidavit as criticism was submitted by [illegible] in support of their respective motions, the [illegible] contend that the factor of the civil court should be preferred in this manner.

The use of the motion to dismiss, instead of the demurrer, was not unknown to the practice in this state before the adoption of the present Civil Practice Act. [illegible] 111, Ann. Stat). We think the same rules in general are applicable now as then. Facts which appear upon the record of the court are not required to be supported by affidavit, since the court by its record is sufficiently informed. All matters which do not appear upon the face of the proceedings must be so supported, and we are inclined to the opinion that under Section 32 of the Civil Practice Act the motions submitted in behalf of defendants might not have been made specific in their nature, but such some of the points (now apparently raised in the briefs) must for the first time should have been supported by affidavit, if it had been the intention of defendants to rely thereon. Such, for instance, is the allegation in their contention that the motions should be sustained because the interests of the [illegible] were not part of their sworn affidavit. It does not lie [illegible], Illinois and the

Fidelity & Deposit Co. were found and served in Sangamon county does not definitely settle the question of venue (as counterclaimant seems to think.) Indeed if it had been made to appear that defendants were sued out of their proper county, it would not have been necessary on that account to dismiss the suit. Under section 37, chapter 146, Ill. State Bar State. 1935, p. 3116, such a situation would have required the transmission of the cause to the proper county for trial rather than an order dismissing it.

However, although the counterclaimant now contends that the motions were not so specific in form as the statute would require, no objection of that kind seems to have been raised in the trial court, and in the absence of such objection and having secured the advantage of a hearing upon the motions in the form in which they were presented, counterclaimant cannot be heard in this court to contend that the decree should be reversed and the cause remanded merely to require the filing of more specific motions. The Civil Practice Act declares the intention of the legislature that all its provisions shall be liberally construed to the end that justice may be attained. The spirit of that provision, we think, forbids that (where without objection by the parties to the form of the pleadings, a judgment of the court has been entered upon matters in controversy) the judgment should be reversed upon merely technical grounds upon the suggestion of the unsuccessful party, because the decision on the merits was contrary to that desired. For the same reason the complaint here made that instead of dismissing the counterclaim an order should have been entered giving counterclaimant leave to amend, cannot prevail, since the record fails to disclose any request by him for leave to do so.

The controlling questions in this case, as the same are presented on this record, seem to be, first, whether these additional defendants were proper parties to the cause within the meaning of the

Liability & Deposit Co. were found not served in Hampshire county does not definitely settle the question of venue ; it nevertheless seems to point. Indeed if it had been made to appear that defendants were sued out of their proper county, it would not have been necessary on that account to dismiss the suit. Under section 27, chapter 164, Gen. Stats. (1901), as this case stands, dismissal would have required the stipulation of the owner to the proper county for trial rather than an order dismissing it.

However, although the court-rulings now evidence that the matters were not so specific in form as the statute would require, no objection of that kind seems to have been raised in the trial court, and in the absence of such objection and having secured the advantage of a hearing upon the motions in the form in which they were presented, counsel cannot be heard in this court to contend that the lower court in overlooking the above requirement merely to receive the filing of more specific motions. The civil practice act contains the intention of the legislature that all its provisions shall be liberally construed in the end that justice may be attained. The merits of this question, we think, involve some (where circumstances by the parties to the case of the plaintiffs) a judgment of the court has been matured upon motions in controversy; the judgment should be reversed upon strictly technical grounds upon the suggestion of the unsuccessful party, because the decision on the merits was contrary to that desired. For the same reason the overplus have made that instead of dismissing the complaint on order should have been entered giving counsel-defendants leave to amend, cause the record fails to disclose any request by him for leave to do so.

The controlling questions in this case, as the case are presented on this record, seem to be, first, whether these political defendants were proper parties to the same within the meaning of the

Practice Act as set forth in section 25 of the act, and, second, whether the counterclaim was sufficient to give the court jurisdiction within section 38 of the Act. Section 25 of Illinois State Bar Stats. 1935, chapter 110, seems to provide for two and only two classes of cases in which a court may order additional defendants to be brought in to a suit at law. These are, first, where a complete determination of the controversy cannot be had without the presence of such other party, and, second, where some person, not a party, has an interest or title, which the judgment rendered by the court may affect. It would appear, as a matter of first impression, that these additional defendants do not belong to either class so far as the original suit is concerned. The suit brought by plaintiff was in its nature one in assumpsit. The issues disclosed by the pleadings were the simple issues of whether defendants promised and, if they promised, paid. Neither Barr nor Fitzgerald nor Palmer, nor the Fidelity & Deposit Co. of Maryland, could be in any way affected by the result of that suit; neither Barr nor Fitzgerald nor Palmer, nor the Fidelity & Deposit Co. of Maryland held any interest or title which could in any way be affected by the result of that suit. Therefore, unless it appears under section 38 on the facts as disclosed by the counterclaim that their presence was necessary to a determination of the rights of the parties, it would seem they were improperly joined.

Section 38 of the Civil Practice Act (Ill. State Bar. Stats. 1935, chap. 110) is as follows:

> "Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of set-off, recoupment, cross-bill in equity or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief may be pleaded as a cross-demand in any action, and when so pleaded shall be called a counterclaim."

That this section of the Civil Practice act has widely extended the remedy of suitors by way of set-off is apparent from even a casual reading of it. Indeed, it may be said to have almost removed every

Practice Act as set forth in section 37 of the act, and, second, whether the constitutional war authority to give the court jurisdiction within section 33 of the act. Section 17 of Illinois State Bar Stats. 1929, chapter 110, seems to provide for only one class of cases in which a court may order additional defendants to be brought in to a suit at law. These are, first, where a complete determination of the controversy cannot be had without the presence of such other party, and, second, where some actual, bona fide interest or title, which the plaintiff claims by his asserted cause of action, may be affected, in a matter of first instance, that these additional defendants do not belong to either class as to the original suit in controversy. The suit brought by plaintiff was in the nature one in assumpsit. The issues tendered by the pleadings were the simple issues of whether defendants owed and, if they owed, paid. Neither have our bankruptcy nor tribunal, nor the liability of Depositors Co. of Maryland, could in any way affected by the result of that suit; neither have our bankruptcy nor tribunal, nor the liability of Depositors Co. of Maryland had any interest or title which could in any way be affected by the result of that suit. Therefore, unless it appears under section 37 or the facts as disclosed by the counter-claim that their presence was necessary to a determination of the rights of the parties, it would seem they were improperly joined.

Section 37 of the Civil Practice Act (III. Rev. Stat. 1936, chap. 110) is as follows:

"Subject to power, any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, shown in the answer or re-plea, frequently, cross-bill in equity or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief may be pleaded as a counter-claim in any action, and when so pleaded shall be called a counter-claim."

That this section of the Civil Practice Act has clearly enlarged the remedy of suitors by way of set-off in equity, from that a mutual reading of it. Instead, it may be said it has almost removed every

restriction heretofore existing as to what may be the proper subject of set-off. Nor has the Supreme court, so far as we are informed, created any limitation by rule. Manifestly, there must be some limitation imposed, otherwise every resident of the state would be subjected to vexatious litigation in any county of the state in any suit brought in any of the courts of the state at the option of any person made a defendant in any such suit. Under this section the counterclaimant may include demands either legal or equitable in their nature; whether in the nature of contract or of tort; whether the damages claimed are liquidated or unliquidated; and whether by way of recoupment or set off.

It has been suggested that section 38 is necessarily limited by other provisions of the Civil Practice act (Ill. Civil Practice Annc., McCaskill, sec. 38, p. 82). Section 23 provides that the court may order separate trials or make such other order as expedient; section 33, that each counterclaim shall be separately pleaded and numbered; section 43 provides for the separate statement of each counterclaim; section 44, that the court may in its discretion order separate trials of counterclaims, that legal and equitable claims may be tried together, and that a counterclaim may be transferred at any time from the law to the equity docket, or vice versa, as convenient. In this case the counterclaim sets up matters in the nature of an original bill in equity, which, it is believed, under the former practice would be held to be multifarious. It does not set up any matter which is in any way responsive to the issues of the original suit and is not, on either legal or equitable principles, an answer to the cause of action set up in the original pleading. Manifestly, in view of the provisions of the statute, the discretion of the trial court is the only bar to a situation which might well be described as "confusion worse confounded," and without the interposition of that discretion, the hope for a "simple practice" would be-

come impossible. The counterclaim was not in any sense germane to the subject matter of the original suit, and we hold that the court did not abuse its discretion in decreeing that the supposed cause of action set up in the counterclaim should be dismissed without prejudice to a new and independent suit.

For these reasons the order is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

38375

MARY PECIUKAITIS,
Appellee,

vs.

JULIAN MIACZYNSKI et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 639

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants, Julian and Mary Miaczynski, from a decree of foreclosure entered May 16, 1935. The decree found that there was due from defendants to plaintiff the sum of $4691.51, with interest and costs, and directed that in default of payment the premises should be sold. The cause was heard upon exceptions to the report of a master, to whom it had been referred. The chancellor overruled all exceptions and entered a decree as recommended in the report. The only defense interposed is that the loan was tainted with usury, and that therefore under the Illinois statute (see Ill. Rev. State Bar Stats., 1935, chap. 74, secs. 4, 5, 6, 8) no interest should have been allowed, and that since no interest was or could become due, the acceleration of the maturity of the debt, because of alleged default in the payment of the interest, was ineffectual to accomplish that result.

There is little dispute as to the facts. The trust deed was executed September 5, 1923, by Julian Miaczynski and Mary Miaczynski, his wife, to secure their note of that date for the sum of $5000, payable to the order of themselves and by them endorsed, and by its terms drawing interest at the rate of 7 per cent per annum, payable semi-annually. The conveyance was made to Alfred Pinkert, as trustee, who was the president of the Pinkert State Bank, with which Frank Miaczynski, brother of Julian, negotiated for the loan. The evidence indicates that the premises stood in the name of Frank Miaczynski, but that as a part of the transaction

[illegible]

[illegible]

[illegible]

in which the loan was secured, the same were conveyed to Julian Miaczynski.

Frank Miaczynski testified that he went to the bank about a week before September 9, 1923, and inquired as to the possibility of negotiating such a loan upon this property. He talked with the president of the bank, Alfred Pinkert, and was informed by him that in order to obtain the loan it would be necessary to pay seven per cent interest, and that he would be charged three and a half per cent in addition for commission. A few days after the papers were executed Frank paid to the bank the commission amounting to $175 and $17.50 as a charge for drawing the necessary papers in the transaction. His testimony is to the effect that this payment was made in behalf of his brother (meaning Julian Miaczynski, defendant.)

Sometime thereafter, either in 1923 or in 1924, according to the testimony of plaintiff (which is uncontradicted) she purchased the note and trust deed from the bank. Neither then, nor at any time thereafter, did she receive any commission or any part of the commission collected by the bank, nor is there any evidence that she knew that any such commission had been charged in connection with the loan.

September 6, 1926, by an agreement in writing entered into between Alfred Pinkert, as trustee,(who was in the writing (erroneously) described as "the legal owner and holder of the note") and the owners, Julian and Mary Miaczynski, the maturity of the note was extended until September 5, 1929. The agreement provided that the interest should be reduced to six and a half per cent, and the bank again charged and collected (this time from defendant Julian Miaczynski) $175 commission for securing the extension. Again, on or about August 10, 1929, defendants made a payment on the loan of $1500, and at that time by another agreement in writing the balance of the loan, amounting to $3800, was extended for a term of five years with the

in which the loan was related. The note were assigned to Julian Hinsenwold.

From discovered testimony that is not in the bank about a week before November 7, 1927, and irrelevant as to the possibility of negotiating such a loan upon this property. He talked with the president of the bank, Alfred Tibbetts, and was informed by him that in order to obtain the loan it would be necessary to pay seven per cent interest, and that he would be charged interest and a half per cent in addition for commission. A few days after the papers were executed Frank Pell in the bank the commission amounting to $175 and $17.50 as a charge for insuring the mortgagee against loss in the transaction. His testimony is to the effect that this payment was made to Donald of the company [illegible] Kimpenhout,[illegible].]

Sometime thereafter, after 12 1928 or in 1929, according to the testimony of plaintiff (which is uncontradicted) the partnership the note and trust deed from the bank. Neither then, nor at any time thereafter, did the receive any commission or any part of the commission retained by the bank, nor is there any evidence that she knew that any such commission had been charged in connection with the loan.

December 2, 1925, by an agreement in writing entered into between Alfred Tibbetts, as trustee,(who was in the writing (erroneously) described as "the legal owner of the note") and the owners, Julian and Mary Hinsenwold, the equitably of the note was assigned with interest 2, 1928. The agreement provides that the interest should be reduced to six and a half per cent, and the bank agree[illegible] the mortgagee (this time [illegible] defendant) $175 commission for negotiating the extension. Again, on or about August 2, 1929, defendants [illegible] a payment on the loan of $100, and at that time by another agreement in writing the balance of the loan, amounting to $2750, was extended for a term of five years with the

provision that interest should thereafter be paid at the rate of six per cent per annum. The memorandum executed by the trustee at this time also stated the bank was the legal owner and holder of the note, although this was not the fact. All semi-annual payments of interest maturing on and before March 5, 1933, have been paid, but default was made in the payment of interest falling due September 5, 1933, and because of that alleged default plaintiff elected to declare the whole indebtedness due and payable. Notwithstanding the statements made in the extension agreement, the evidence tends to show, the master found (and the chancellor approved his finding) that plaintiff was at all times, when extensions of the indebtedness were made, the real owner and holder of the securities and had the same in her possession. The decree, in conformity with the report of the master, found that Julian and Mary Miaczynski purchased the property in question for $9200 from Frank Miaczynski; that divorce proceedings were pending between Frank and his wife; that the purchase was made through the court; that Frank arranged the transaction for his brother Julian and arranged with the bank for a loan of $5000, which was used in purchasing the premises for $9200; that Frank paid the commission to the Pinkert State Bank; that the payment was not made by Julian but by Frank, and that the defense of usury could therefore not be sustained. Plaintiff contends that the purchase price paid by Julian to Frank Miaczynski was reduced by the amount of the usury, and that defendants, as purchasers, are therefore precluded from questioning the validity of the debt in conformity with the rule laid down in Cleaver v. Buckley, 17 Ill. App. 82; Lesley v. Sloan, 165 Ill. 541. Defendants say Frank paid as the agent of Julian, but the finding is against them on that issue of fact. There is no doubt that under the law a broker who negotiates a loan of another person's money may charge the borrower a commission without thereby making the loan at the

full rate of interest usurious. It has been so held in Northern Trust Co. v. Sanford, 308 Ill. 381, and Donnell v. Bernard, 319 Ill. 392. If the original loan was tainted with usury, there is no doubt that under the law of this State that defense could be interposed against any subsequent owner of the notes and trust deed, even though such owner took without notice, in good faith and for value. Olds v. Cummings, 31 Ill. 188; Schultz v. Broelowitz, 191 Ill. 249; Hatchkiss v. Norwood Park Assoc., [illegible] Ill. 248; Pittsburgh Plate Glass Co. v. Krausz, 291 Ill. 84; Hirsch v. Arnold, 318 Ill. 28; Central Life Ins. Co. v. Sawisk, 262 Ill. App. 569.

But conceding such to be the law and conceding that the original loan was tainted with usury, it does not follow that the defense of usury may be successfully interposed in this case. None of the cases cited, so far as we are aware, go to the extent of holding that such defense may be interposed as against an innocent purchaser for value, in good faith and without notice, when a renewal or extension agreement has been made by the debtor and carried out by the owner in good faith. The authorities are to the effect that the subsequent transaction will be deemed to have purged the obligation of the taint of usury, and that the debtor who at his request has received such extension is estopped to urge the defense as against the innocent holder. 66 Corpus Juris 361; Taulbee v. Harris, 173 Ky. 433; Weaver v. Solomovitz, 235 N. Y. 321.

We hold, even assuming the original transaction usurious, that by the two subsequent extensions the loan was purged from such taint, and that plaintiff is entitled to the decree of foreclosure and to recover for the amount found due without any deduction.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

38535

JOSEPH CROWELL,
Appellee,

vs.

GUY A. RICHARDSON and
WALTER J. CUMMINGS as
Receivers, etc., et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

53 11

283 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries and upon trial by jury there was a verdict for plaintiff, with damages assessed at $4,000, upon which the court, having denied defendants' motions for a new trial and in arrest, entered judgment.

Defendants contend for reversal, urging that the evidence does not fairly and reasonably tend to prove the cause of action alleged in the declaration; that the verdict is against the manifest weight of the evidence; that the court erred in giving, refusing and modifying instructions; that the damages awarded were excessive, and that the court erred in its rulings on the admission of evidence.

The declaration was in two counts, the first of which in substance charged that on June 16, 1933, while plaintiff was a passenger for hire in one of defendants' cars and in the exercise of due care, defendants so negligently ran, managed, operated and propelled the street car that plaintiff was violently thrown to and upon the ground. The second count averred that under like circumstances at the same time and place defendants negligently permitted and allowed the street car to suddenly and violently jerk forward in such manner as to throw plaintiff to and upon the ground, whereby he was greatly injured, etc.

At the close of all the evidence defendants submitted an instruction in their favor, which they requested the court to give.

The motion was denied, thus preserving for review in this court the question of whether there was any evidence from which the jury could reasonably find in favor of plaintiff under the declaration.

As to the question of whether the evidence proves the cause of action alleged in the declaration, we do not hesitate to hold that that was a question for the jury. The evidence shows that defendants are common carriers of passengers upon their street cars operated on tracks laid in the public streets of the city of Chicago. Plaintiff lived at 7353 South Carpenter street and was employed in the mailing division of the post office located in the heart of the city. He had been employed there for 41 years. His work was performed in the Federal building situated on the east side of South Clark street, a public highway extending north and south, between Jackson boulevard and Adams street, which extend east and west. Plaintiff's hours of labor at the building were from eight o'clock a. m. to 4:30 p. m., with a half hour for lunch.

On the morning of June 16, 1933, plaintiff, in the course of his journey to the building where he worked, became a passenger on one of defendants' cars running north on Wentworth avenue and Clark street through the city and passing the post office building on the west side of it. Plaintiff was accustomed to enter the post office building by an entrance on the south or Jackson boulevard side of the building. On this particular morning plaintiff carried a pair of shoes wrapped in paper; he purposed to have the shoes repaired at a shop on Adams street about the middle of the block, just across from the large store known as the Fair. He says he had a seat all the way downtown and kept it until the car had passed Jackson boulevard; then he walked out to the rear door of the street car, stepped onto the platform at the edge of which at the middle between the door and the back of the car, was a post or metal rod on his left. The rod extended up and down, and also attached

The motion was denied, this occurring for review in this court the question of whether there was any evidence from which the jury could reasonably find the fact of plaintiff under the instruction.

As to the question of weight the evidence proves the same as matter alleged in the declaration, so is not material in this case that was a question for the jury. The evidence shows that defendant's common carriers of passengers upon their street cars stopped on tracks laid in the public streets of the city of Chicago. Plaintiff lived at 7221 South Commercial street and was employed in the mailing division of the post office located in the heart of the city. He had been employed there for 21 years. His work was performed in the Federal building situated on the east side of Dearborn Street, a public thoroughfare stretching north and south, between Jackson boulevard and Adams street, which extend east and west. Plaintiff's hours of labor in the building were from eight o'clock a. m. to 4:30 p. m., with a half hour for lunch.

On the morning of June 16, 1923, plaintiff, in the course of his labor, by in the building there he noted, became a passenger on one of defendants' cars running north on Dearborn avenue and first street through the city and reaching the east entrance leading to the post office of U. Plaintiff was accustomed to enter the post office building by a entrance on the north or Jackson boulevard side of the building. On this particular morning plaintiff carried a pair of shoes wrapped in paper; as witnessed to have the shoes repaired at a store on State street about the 4:30 of the morning, just across from the large store known as the Fair. He hope to had a meet all the car checkers and left, until the car and passed Dearborn boulevard; then by reason not to the rear door of the street car, reached down the platform at the south of which at the middle between the door at the back of the car, was a post or metal rod on his left. The rod extended up and down, and also attached

to the platform was a step extending toward the ground. Plaintiff says that when he stepped out of the car to the platform there were six or eight persons on the platform, and that the conductor sat at the back of the car inside a circular iron bar. The car was moving at the time, how fast, plaintiff does not know. He came through the doorway, walked past a passenger and stood facing north at the edge of the platform and toward the rear of the car to the back of this passenger. Plaintiff intended to get off at Adams street. He thinks he held the shoes in his left hand. The car, he says, gave a forward jerk, a kind of swinging motion and a jerk as if it were going to stop, and then started ahead with full speed. He lost his balance; the sudden forward motion threw him back and the swaying motion threw him into the street and he landed on his ankle, hip and elbow. He was 60 years of age and the injuries he received were quite severe. He was picked up and carried into the post office building by two men.

Tyler Beaux, a government employee, was at that time walking north on the east side of Clark street near Quincy street with a Mrs. Trapp, another employee. He noticed the street car as it seemed to slow up a little and jerk, and then he saw plaintiff falling. He saw plaintiff tumble outward from the car, east toward the post office. The street car stopped after the accident. Mrs. Trapp testified that she first noticed the accident when she saw plaintiff fall and hit the ground.

The theory of defendants is (and they gave evidence tending to show) that plaintiff attempted to alight from the street car while it was in motion and received his injuries in that way. Some of the witnesses for defendant testified positively that plaintiff jumped off the car while it was in motion. While there was much evidence to sustain defendants' theory, we cannot say that there was no evidence from which the jury could reasonably conclude that the

to the platform was a slow saunter towards the ground. Plaintiff says that when he climbed out of the car to the platform there were six or eight persons on the platform, and that the conductor had at the back of the car inside a circular iron bar. The car was moving at the time, how fast, plaintiff does not know. As soon dismount the doorway, walked past a passenger and stood facing, with at the edge of the platform and toward the rear of the car in the hand of this passenger. Plaintiff intended to get off at Adams Street. As stepped he held the arms in his left hand. The car, as says, gave a forward jerk, a kind of swinging motion and a jerk as if it were going to stop, and then started ahead at its full speed. He lost his balance; the sudden forward motion threw his feet out, he swung within three his feet the street and he landed on his knees, rip and skinned. He was 60 years of age and the injuries he received were quite severe. He was picked up and carried into the post office building by two men.

Tyler Dawson, a government employee, was at that time walking north on the east side of Clark street near Quincy street with a friend, another employee. He noticed the street car as it turned to plow on a little and jerk, and then he saw plaintiff falling. He saw plaintiff thrown outward from the car, then toward the west side. The street car stopped after he noticed. Mr. Dawson testified that the first motion the conductor made was saw plaintiff fall and hit the ground.

The theory of defendants is (and they gave evidence tending to show) that plaintiff attempts to alight from the street car while it was in motion and received his injuries in that way. Some of the witnesses for defendant testified positively that plaintiff jumped off the car while it was in motion. This there was much evidence in certain defendants' behalf, so cannot say that there was no evidence from which the jury could reasonably conclude that the

material facts alleged in the declaration by plaintiff were established. Defendants argue that by voluntarily standing at the edge of the platform without holding onto anything, plaintiff was guilty of contributory negligence. They say that the evidence offered is entirely consistent with the theory that the alleged jerk or sway of the car was such as was usual and unavoidable. They cite cases announcing the rule that where the evidence is just as consistent with one theory as with another, plaintiff cannot recover, and urge that defendants' liability cannot rest on mere speculation or conjecture but must be based upon evidence fairly tending to prove the allegations of the declaration. Defendants presented evidence tending to show that the car did not jerk. Defendants did not attempt to prove that the jerking or swaying of the car was such as was usual and necessarily incidental to the mode of conveyance adopted. If such was the fact, the evidence of it was peculiarly in their possession and knowledge. The question of contributory negligence is usually for the jury. There are many cases holding that it cannot be declared as a matter of law that getting on or off a moving street car is negligence per se.

The contention of defendants that the verdict of the jury is against the manifest weight of the evidence, while in its nature akin to the contention already considered, must be governed by a different rule. In the one case the question is whether there is any evidence in the record which, considered in the light most favorable to plaintiff, could justify a verdict in his favor. While in the second case the question is whether the verdict returned is, upon a consideration of all the evidence submitted, clearly and manifestly against the weight of the evidence. If it is, the motion for a new trial should have been granted by the trial Judge and the denial of such motion is reversible error. We have given due consideration to this question also. Defendants contend that the case

material fact alleged in the declaration by plaintiff were established. Defendants argue that by voluntarily standing at the edge of the platform without calling once anything, plaintiff was guilty of contributory negligence. They say that the evidence offered is entirely consistent with the theory that the alleged injury or death of the car was such as was usual and unavoidable. They also have appealed upon the rule that where the evidence is not in conflict with the theory of the plaintiff, plaintiff cannot recover, and upon the defendants' liability cannot rest on mere speculation or conjecture but must be based upon evidence tending to prove the allegations of the declaration. The defendants presented evidence tending to show that the car did not jerk. Defendants did not attempt to prove that the jerking or swaying of the car was such as was usual and necessarily incidental to the mode of conveyance adopted. If such was the fact, the evidence of it was peculiarly in their possession and knowledge. The practice of constructing platforms in a manner for the city, there may cases holding that it cannot be declared as a matter of law that getting on or off a moving street car is negligence per se. The question of determining that the verdicts and jury in against the manifest weight of the evidence, which is by nature akin to the contention already considered, must be answered by a different rule. In the one case the question is whether there is any evidence in the record which, considered in the light most favorable to plaintiff, could justify a verdict for him. While in the second case the question is whether the verdict returned is, when a consideration of all the evidence considered, clearly and manifestly against the weight of the evidence. If it is, the motion for a new trial should have been granted by the trial judge and the denial of such motion is reversible error. We have given due consideration to this question also. Defendants contend that the case

for plaintiff rests upon his own uncorroborated testimony. The record does not bear out that contention. There is, as already recited, the evidence of other witnesses who corroborate the testimony of plaintiff, and it must, we think, also be held that there are uncontradicted facts and circumstances in the case tending to corroborate his testimony. It is true that occurrence witnesses testified for defendants, some to the effect that plaintiff voluntarily stepped off the car while it was in motion; others that he jumped off under the same circumstances; but there is some inconsistency in the narrations these witnesses give of the occurrence, and the story as related by them is in some respects quite improbable. Under such circumstances, upon the whole evidence, we think the verdict of the jury, which has been approved by the trial Judge (both jury and Judge having seen and heard the witnesses) is entitled to a degree of credence, which we may not disregard. We have no right to set aside the verdict unless it is clearly and manifestly against the weight of all the evidence. We cannot say that the verdict is of that character.

Defendants also complain of the rulings of the court upon instructions. Defendants requested the court to instruct the jury, in substance, that if plaintiff's injuries were due to the attempt to alight from a moving street car he had failed to prove the allegations of the declaration and would not be entitled to recover. The court modified the instruction by adding, "and if you believe such attempt of plaintiff was negligence." Defendants say that both counts charged plaintiff was forcibly thrown from the street car by its movements through the negligence of defendants, and that if he was not so thrown therefrom but injured as a result of attempting to alight from the moving car, as some of the evidence tended to show, then he ought not to recover regardless of whether the attempt to do so was or was not negligence. Defendants urge strenuously that for that reason the instruction was palpably erroneous. They cite Fisher v. Richardson, 280 Ill. App. 618, not reported; Lake St. Elevated R.R. Co

for plaintiff risks risk in our uncertainty and tendency. The result does not bear out that assumption. There is, as already implied, the evidence of those witnesses who corroborate the testimony of plaintiff; and it seems, on balance, that he had that there are inconsistencies and differences in the case tending to corroborate the testimony. It is here that constructive evidence [illegible] for determine, some to the effect that plaintiff voluntarily assumed all the risk while it was in motion; other that the defendant [illegible] all under his own circumstances; but there is some inconsistency in the narrations. These witnesses give of the occurrence, and the story as related by them is in some respects quite improbable. Under such circumstances, upon the whole evidence, we think the verdict of the jury, which has been approved by the trial Judge (both jury and Judge having seen and heard the witnesses) is entitled to a degree of credence, which we may not disregard. We have no right to set aside the verdict unless it is clearly and manifestly against the weight of all the evidence. We cannot say that the verdict is of that character.

Defendants also complain of the rulings of the court upon instructions. Defendants requested the court to instruct the jury, in substance, that if plaintiff's injuries were due to the attempt to alight from moving street car and failed to prove the allegations of the declaration and could not be recovered in trover. The court modified the instruction by adding, "but if you believe such attempt of plaintiff was negligence." Defendants say that both counts charged plaintiff was forcibly driven from the street car by its servants through the negligence of defendants, and that if he was not so thrown therefrom but injured in a result of attempting to alight from the moving car, in view of the evidence tended to show, then he could not in proper regard of what is the attempt to do so was an act of negligence. Defendants urge strenuously that for that reason the instruction was erroneous. They cite Street v. Richardson, 200 Ill. App. 618, not reported; Lake St. Elevated R.R. Co

v. Shaw, 203 Ill. 39; Buckley v. Mandel Bros., 213 Ill. 344, and many other cases. Assuming this instruction to be erroneous, under circumstances appearing in this record, defendants are not in a position to avail themselves of such error for two reasons: first, because they assented to the modification of the instruction as made, and, second, because in another instruction given at their own request the same supposed errors occur.

Defendants also complain of an instruction given by the court at the request of plaintiff to the effect that while it was the duty of plaintiff to use his faculties with ordinary and reasonable care in looking out for danger, to avoid injury, still if the jury believed from the evidence the injury was unavoidable on plaintiff's part, or plaintiff did not have time or opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such danger and a reasonable opportunity to avoid it, plaintiff should not be charged with contributory negligence. They also complain of an instruction to the effect that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to the passengers riding upon their trains, or while getting upon them or alighting therefrom. Whatever might be the objections to these instructions upon defendants' theory of the case, we think they were proper upon plaintiff's theory, which there was evidence tending to support, and that it was therefore not reversible error to give them.

Defendants complain, in the next place, that the damages awarded are excessive. The evidence upon this issue shows that plaintiff was 60 years of age at the time he received his injuries; that the physician by whom he was treated found a fracture of the upper third of the femur, extending from the greater trochanter to the lesser

v. Shaw, 8Ch 131. 9th Shaw v. Lower Ely, 4th 131, 141, and many other cases. Accordingly this instruction is to be construed, under circumstances occurring in this trial, defendants are not in a position to avail themselves of not error for the reason: first, because they assented to the modification of the instruction as made, and, second, because in another instruction that as made was required the same measure of this error.

Defendants also complain of an instruction given by the court at the request of plaintiff in the effect such evidence is, was the duty of plaintiff to use his faculties with ordinary and reasonable care in avoiding any far danger, so avoid injury, still if the jury believed from the evidence the injury was unavoidable on plaintiff's part, or plaintiff did not have time or opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such danger and a reasonable opportunity to avoid it, plaintiff could not be charged with contributory negligence. The law manifestly of an instruction in the direct that common carriers of passengers are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to the passengers riding upon their trains, or while getting upon them or alighting therefrom. Whatever also is the objections to these instructions upon defendants' claim, of the case, we think they were cured upon plaintiff's theory, which instructions was evidence tending to support, and that it was therefore not prejudicial error to give them.

Defendants contend, in the last place, that the verdict is excessive. The evidence upon this issue shows that plaintiff was 30 years of age at the time he received his injuries; that his physician by whom he was treated found a fracture of the upper third of the femur, extending from the greater trochanter to the lesser

trochanter with a separation of one-fourth of an inch of the bone. The evidence of the physician also tended to show that the effect of the injuries was a permanent limitation of the motion of the muscles attached to the thigh. Plaintiff was placed in a cast which extended from his hips to his toes, and this situation continued for twelve weeks, during which time he was confined to his bed and suffered severe pain. After the removal of the cast, he used crutches for two months. He still walks with a slight limp. The fracture was in the straight part of the leg and did not involve in any way the ball at the end of the hip joint. Plaintiff's evidence attempts to show that while the leg does not bother him in good weather, on rainy days he has rheumatism in the limb at the place of the injury; that when he crosses his legs one of them becomes numb and that his foot swells at night. Plaintiff was employed by the United States government in the Post Office Department at $191.66 a month. After the injury he was examined by a government doctor and did not thereafter go back to work. Defendants offered to show that he was pensioned by the United States government in August, 1933, which was about two months after the injury occurred, but an objection interposed by plaintiff to this evidence was sustained.

The question of damages is one that is peculiarly for the jury. We cannot say that the award here is excessive to such an extent as to indicate prejudice.

Complaint is made by defendants that the court excluded evidence tending to show that about two months after the injury plaintiff was pensioned by the government. It is argued that this evidence was permissible, as otherwise the jury might have believed the reason that plaintiff did not go back to work was wholly due to his injury. The record does not show that in offering the evidence it was limited to any such purpose. Its admission without limitation

stimulated with a hypodermic of tri-iodide of an iron of the same.
The evidence of the physicians tends to show that the effect
of the injuries was a permanent limitation of the motion of the
muscles attached to the thigh. Plaintiff was injured in a case which
arrived from the judge in his view, and that adjudication considered the
injury serious, during which time he was confined in the hospital nine
days, after which time he was confined to his home for one and
fourth months. After the removal of the cast, he used crutches
for two months. He still walks with a slight limp. The injuries
was in the acetabulum part of the leg and it had injuries in any way
the ball at the end of the hip joint. Plaintiff's witnesses testified
to such that while the leg was not longer but in good position, on
their does be the deformation in the left of the place of the injury;
that when he removes his leg one of them brought out and left his
leg swelling at night. Plaintiff was employed by the Indian Bureau
stationed in the Post Office Department at Ind. at a salary. After
the injury he was examined by a government doctor and did not indep-
after go back to work. Defendants offered to show that he was pen-
sioned by the United States government in August, 1918, which was
about two months after the injury occurred, but on objection inter-
posed by plaintiff to this evidence was sustained.

The judgment of the court in our view is properly for the
jury. We cannot say that the award here is excessive to such an
extent as to indicate prejudice.

Complaint is made by defendants that the court instructed
evidence tending to show that about two months after the injury
plaintiff was examined by the government. It is argued that this
evidence was prejudicial, as attempting the jury might have believed
the reason that plaintiff did not go back to work was because of
his injury. The record does not show that in stating the grounds
it was limited to any such purpose. The instruction although inadvertent

might have led the jury improperly to infer that this evidence was material upon the question of the amount of damages.

We find no reversible error in the record, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

38677

JULIA E. GREEN,
Appellee,

vs.

CHICAGO TITLE & TRUST CO., et al.,
Defendants.

On Appeal of JOHN P. SCHAEFGEN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, John P. Schaefgen, one of the mortgagors, in a proceeding to foreclose a mortgage, from a decree entered October 30, 1935, approving the master's report of sale and distribution, entering a judgment for deficiency in favor of plaintiff and against defendants John P. Schaefgen and Mary Schaefgen, for the sum of $736.79, and appointing a receiver for the premises to collect the rents, issues and profits of the same during the period of redemption.

Defendant contends that the order was erroneous, first, because, as it is said, it is not based upon any pleading which was appropriate thereto, and, secondly, because the bill of complaint was not verified in due form. Both contentions are without merit.

The record discloses that plaintiff filed her bill of complaint June 5, 1935. It prays for the foreclosure of the trust deed and contains the usual averments in bills of that character. It alleges a valid indebtedness, the execution of the notes and the trust deed; avers that the trust deed pledged the rents, issues and profits of the premises, and that the mortgagors thereby consented that in case of default a receiver might be appointed to collect the rents, and alleges that the appointment of a receiver is essential to the protection of plaintiff's rights. It prays for answer, for the appointment of a receiver pendente lite and during the period of redemption, for an accounting, for a sale in default of

SCOTT

MELLA D. BROWN,
Appellee,

vs.

BRIAN-VITA & SCOTT CO., et al.,
Defendants.

On Appeal at Law (J. Sullivan,
Appellant.

Appellant.

[illegible] MUTUAL BUILDING AND INVESTMENT SOCIETY
of Cook County.

Appellee.

This is an appeal by defendant, Tom S. Sullivan, one of the mortgagors, in a proceeding to foreclose a mortgage, from a decree entered October 30, 1924, overruling the mortgagor's pleas and distributive, entering a judgment for deficiency in favor of plaintiff and against defendants Tom S. Sullivan and Mary Sullivan, for the sum of $[illegible], and providing a receiver for the premises to collect the rents, issues and profits of the same during the period of redemption.

Defendant concedes that the order was erroneous, first, because, as it is said, it is not based upon any pleading which was appropriate thereto, and, secondly, because the bill of complaint was not verified in due form. Both contentions are without merit.

The record discloses that plaintiff filed her bill of complaint June [illegible], 1924. It prays for the foreclosure of the trust deed and contains the usual averments in bills of that character. It alleges a valid indebtedness, the execution of the notes and the trust deed; avers that the trust deed covers the rents, issues and profits of the premises, and that the mortgagors thereby waived that in case of default a receiver might be appointed to collect the rents, and alleges that the appointment of a receiver is necessary to the protection of plaintiff's rights. It prays for answer, for the appointment of a receiver pendente lite and during the period of redemption, for an accounting, for a sale in default of

payment, and in case of deficiency a decree in favor of plaintiff therefor against such defendants as are found to be personally liable. It also prays for other and further relief. The decree finds in detail that the averments of the bill were proved. We hold that these averments are sufficient.

Defendant cites Augrecht v. Henrici, 113 Ill. App. 398; Gauer v. Voltz, 190 Ill. App. 189; Van Ness v. Arado, 257 Ill. App. 56. The questions which arose in these cases are distinguishable, in that the receivers there were appointed pendente lite, and in no one of the cases was the application for the receiver supported by averments or proofs such as appeared here. As to the contention of defendant that the verification of the bill was insufficient as being made upon information and belief, it is sufficient to say no question of that kind arises here, since defendants answered the bill, and the evidence was taken and appears as part of the record. The pleadings would therefore have been sufficient, even if not verified at all. The appointment of the receiver on this record was entirely proper, and the order is affirmed.

ORDER AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

payment, and in case of infringement a decree in favor of plaintiff
damages against such defendants as may found to be personally
liable. In this state it exist not joint relief. The issues
final in detail that are necessary of the bill were proper. We
hold that these provisions are sufficient.

Defendant cites Jackson v. Smithal, 111 Ill. App. 369;
Sauer v. Foth, 180 Ill. App. 188; Van Buen v. Adams, 227 Ill. App.
86. The questions which arose in these cases are distinguishable.
In that the remedies sought were equitable injunctive relief, and in
no one of the cases was the application for the receiver supported
by affidavits or proofs as required here. As to the sufficiency
of defendant that the verification of the bill was insufficient as
being such mere information and belief, it is sufficient to say
on reading of that bill taken here, other defendants interposed the
bill, and the evidence for them and appears in part of the record.
The pleadings would therefore have been sufficient, even if not
verified at all. The appointment of the receiver on this record
was entirely proper, and the order is affirmed.

AFFIRMED.

Matchett, P. J., and d'Esmond, J., concur.

38425

ALMA R. McCAULEY,
Appellant,

vs.

HETTIE J. KING,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 639[4]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Alma R. McCauley seeks to reverse the judgment of the Superior court of Cook county by which Hettie J. King was awarded $2000, the amount of a life insurance policy issued by the Travelers Life Insurance Company of Hartford, Connecticut, on the life of Harry A. McCauley.

January 23, 1934, Alma R. McCauley filed her complaint for divorce against Harry A. McCauley. The case was heard before the chancellor and a decree of divorce was entered in plaintiff's favor on April 25, 1934. The court found in the decree that the parties had settled their property rights and "that the Defendant has agreed to pay and the Complainant to accept the sum of $2750.00 in full of all claims of alimony, past, present and future, attorneys' fees, court costs, dower, *** homestead and any and all other claims." The decree provided that the $2750 should be paid as follows: $15 on the date of the entry of the decree and $75 per month thereafter, and that to secure the payment of the $2750 the defendant agreed to keep in force a life insurance policy on his life, with the plaintiff named as beneficiary; that plaintiff was to hold the policy, and in the event of the death of defendant (the insured) prior to the time of payment of the $2750, the insurance money due on the policy was to be used to pay the balance of the $2750 remaining unpaid; that if the $2750 were paid before the defendant died, the policy was to be returned to him. The policy

came into the possession of Ward H. Harris, attorney for the defendant, Harry McCauley, in the divorce suit, and who is attorney for Hettie J. King in this court; on May 4, 1934, about 4 days after the divorce decree was entered, Harris wrote plaintiff as follows: "Upon instructions from Mr. McCauley, I am enclosing herewith his check for $15.00 to cover this weeks alimony payment.

"I am holding Mr. McCauley's insurance policy in the sum of $2000 and am arranging with the insurance company to attach the proper affidavits as to the beneficial interest as set forth in your divorce decree.

"Mr. McCauley has asked me to hold this policy in escrow in my vault and I trust this is satisfactory to you, inasmuch as you are protected by the decree."

February 7, 1935, plaintiff filed her petition setting up the entry of the divorce decree, the payments made on account of the alimony, aggregating $735; the death of the defendant Harry A. McCauley; the insurance policy, and that Hettie J. King claimed the money because she was named as beneficiary in the policy. Process was issued against the insurance company and Hettie J. King, and after some dilatory motions made by her she filed an answer. The insurance company answered admitting that it owed the $2000 which was claimed by plaintiff and by Hettie J. King, and by order of court the money was deposited with the clerk and the insurance company was dismissed out of the case, so that the contest here is between Alma R. McCauley and Hettie J. King.

A number of motions have been made by Hettie J. King in this court to dismiss appeals from a number of orders entered in the case. All these motions have heretofore been denied except the motion to dismiss the appeal from an order entered June 28, 1935, which was reserved to the hearing. From that order it appears that attorneys for Hettie J. King moved the court for an

sons into the possession of Tom S. Larson, minority for the defendant, Jerry Lodwing, in the Styrene suit, was now in attorney for Bettie Z. King in this court; on May 1, 1968, about 2 days after the divorce decree was entered, Jerry wrote plaintiff as follows: "Upon instructions from Mr. Lodwing, I am enclosing herewith his check for $18,000 to cover his wife's alimony payment.

"I am notifying Mr. Lodwing's insurance policy in the sum of $5000 and am arranging with the insurance company to attach the proper affidavits as to the beneficial interest as set forth in your divorce decree.

"Mr. Lodwing has asked me to hold this policy in escrow in my vault and I trust this is satisfactory to you. Instead as you are interested in the decree."

February 7, 1971, plaintiff filed her petition setting up the entry of the divorce decree, the payments made on account of the alimony, amounting $720; the death of the defendant Jerry L. Lodwing; the insurance policy, and that Bettie Z. King claimed the proceeds due and owing as beneficiary in the policy. Thereafter was issued against the insurance company and Bettie Z. King, and after some military motions made by her she filed an answer. The insurance company answered admitting that it owed the $5000 which was claimed by plaintiff and by Bettie Z. King, and by order of court the money was deposited with the clerk and the insurance company was discharged out of the case, so that the amount here in controversy was $1, currently was Bettie Z. King.

A number of motions then came, made by Bettie Z. King in this court to dismiss (p-ele 72) a number of pleas entered in the case. All these motions were successfully been denied except the motion to dismiss was sustained from an order entered June 24, 1972, which was reversed in the Appellate. From that order it appears that attorneys for Bettie Z. King moved the court for an

order directing the clerk of the court to pay forthwith the $2000 to Hettie J. King. The order recites that an order was entered May 21, 1935, whereby the insurance company was ordered to pay the proceeds of the insurance policy to Hettie J. King; and that on May 23, 1935, a notice of appeal was filed, and on June 1[illegible], 1935, on motion of plaintiff, the court fixed the amount of a supersedeas bond at $500. The order then continues "and it further appearing to the court that more than thirty (30) days have expired since the entry of the said order, and that no supersedeas bond has been filed by the plaintiff and that the proceeds of the insurance policy have not been paid to the said Hettie J. King." The order further recites that on June 26th an order was entered that the insurance company deposit with the clerk of the court the $2000. It was then ordered that the clerk of the court pay forthwith the $2000 to Hettie J. King. Plaintiff has appealed from this order and defendant contends that the order is but an interlocutory order and therefore not appealable. We think there is no merit in this contention. If the clerk was required to pay the $2000 forthwith to Hettie J. King as the order directed, plaintiff would receive but little benefit from prosecuting the appeal from the other orders. The motion to dismiss is denied.

The record discloses that the insurance policy was issued to Harry A. McCauley on June 20, 1920, and at that time plaintiff, Alma R. McCauley, then his wife, was named as beneficiary. Afterward on November 29, 1933, a little less than two months before the divorce suit was brought, Harry A. McCauley had the beneficiary changed to Hettie J. King, his aunt.

Counsel for Hettie J. King say in their brief that "The Court properly dismissed the petition of the plaintiff [Alma R. McCauley] for want of equity and ordered the Travelers Life Insurance Company of Hartford, Connecticut, to pay the proceeds of

order directing the clerk of the court to pay forthwith the [illegible] to Bertie L. King. The order recites that an order was entered May 21, 1932, whereby the insurance company was ordered to pay the proceeds of the insurance policy to Bertie L. King; and that on May 22, 1932, a notice of appeal was filed, and on June 21, 1932, on motion of plaintiff, the court fixed the amount of a supersedeas bond at $500. The order then continues "that it further appearing to the court that some time during July the defendant filed the notice of the said trial, and that no supersedeas bond has been filed by the plaintiff and that the proceeds of the insurance policy have not been paid to the said Bertie L. King."

The order further recites that an ex parte order was entered that the insurance company deposit with the clerk of the court the [illegible]. It was then ordered that the clerk of the court pay forthwith the [illegible] to Bertie L. King. Plaintiff has appealed from this order and defendant contends that the order is not an interlocutory order and therefore not appealable. We think there is no merit in this contention. If the clerk was required to pay the [illegible] to Bertie L. King on the order directed, plaintiff would receive the little benefit from prosecuting the appeal from the other order. The motion to dismiss is denied.

The record discloses that the insurance policy was issued by Harry A. Mahaffey on June 20, 1926, and at that time plaintiff, Alma E. Mahaffey, then his wife, was named as beneficiary. Afterward on November 29, 1932, a little less than two months before the divorce will was brought, Harry A. Mahaffey had the beneficiary changed to Bertie L. King, his ward.

Demand for Bertie L. King was in their brief that "the court properly directed the position of the plaintiff [Alma E. Mahaffey] for that of worth and ordered the Travelers Life Insurance Company of Hartford, Connecticut, to pay the proceeds of

the insurance policy to the defendant, Hettie J. King, the beneficiary named therein," because (1) there was no assignment of the policy during the lifetime of the insured, Harry A. McCauley, and (2) that McCauley never gave up dominion or control of the policy, and that plaintiff never acquired dominion and control of the policy. We think there is no merit in any of these contentions.

It appears from the decree of divorce that the parties expressly agreed they had settled their property rights whereby the defendant in the divorce suit was to pay plaintiff $2750 and to secure the payment of that money or any part of it remaining unpaid, the policy was to be pledged as security. Thereafter the policy was in the possession of the defendant's attorney, Harris, and he wrote a letter, which we have quoted, advising plaintiff of this fact, and that Mr. McCauley had asked him to hold the policy in escrow for the purpose mentioned in the decree. In these circumstances counsel for Hettie J. King, who had the policy in his possession pursuant to the decree, will not now be permitted to stultify himself and contend that the policy was not pledged as security for the alimony remaining due and unpaid.

The insured, Harry A. McCauley, having reserved the right to change the beneficiary and having exercised that right, the beneficiary, Hettie J. King, took only an expectancy which did not arise to the dignity of a property right. Where a policy of insurance is assigned or pledged, as in the instant case, to secure an indebtedness, the rights of the beneficiary are not affected by such an assignment except to the extent of the debt secured thereby. Erskine v. Twyckenham Land & Ins. Co., #33124, Appellate Court, First District, (not published); Union Trust Co. v. Chicago Natl. Life Ins. Co., 267 Ill. App. 470; Katz v. Ohio Natl. Bank, 127 Ohio, 531.

We are further of opinion that plaintiff's rights are not

the instrument which on the [illegible] Article 1, Sec. 8, the Constitution "shall [illegible] (1) [illegible] or [illegible] of the policy, and (2) this [illegible] work was or [illegible] of the policy, and that plaintiff never acquired [illegible] and notice of the policy. We think there is no merit in any of these contentions.

It appears from the record of trial that the parties expressly agreed that the entire property rights of the husband in the divorce suit was to pay plaintiff [illegible] to secure the payment of that amount on any part of it remained unpaid. The policy was to be pledged as security. Therefore the policy was in the possession of the defendant's attorney, Hurtig, and he wrote a letter, which we have quoted, stating plaintiff's [illegible] that, and that Mr. Kennedy had asked him to hold the policy in escrow for the purpose mentioned in the future. In these circumstances counsel for Article 1, Sec. 8 and the policy in his possession pursuant to the decree, will not be permitted to maintain [illegible] that the policy was not pledged to security for the money remaining due and unpaid.

The decree, every a. Kennedy, having reserved the right to change the beneficiary and having exercised that right, the beneficiary, Article 1, Sec. 8, had only an expectancy which is not [illegible] to the dignity of a property right. Where a policy of insurance is assigned or pledged, or in the instant case, to secure an indebtedness, the rights of the beneficiary are not affected by such an assignment except in the event of the death [illegible].

Fraiser v. Insurance [illegible] Co., [illegible], [illegible] Mass. Plus Detailed [illegible] Mutual Life Ins. Co. v. [illegible] Life Ins. Co., 347 Ill. App. 47; Lane v. [illegible] Ass., 137 [illegible], 42.

The sole [illegible] of [illegible] that plaintiff's rights are not

affected by the fact that she did not file her petition for more than ten months after the death of Harry A. McCauley, and that the contention made by defendant in this respect cannot be sustained. During that period of time nothing occurred that would affect the rights of either party to this cause.

Since the amount still remaining due plaintiff, as fixed by the terms of the decree, is more than the amount of the insurance money paid into court, the orders and decrees of the Superior court of Cook county appealed from are reversed and the cause remanded with directions that the money in the hands of the clerk of the court be paid to plaintiff, Alma R. McCauley.

ORDERS AND DECREES REVERSED AND
CAUSE REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

38498

FANNY SAMUELS,
Appellee,

vs.

ARTHUR E. FRANKENSTEIN and
RUDOLPH FRANKENSTEIN,

ARTHUR E. FRANKENSTEIN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 639

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a Chicago school teacher, brought suit against the defendants to recover the value of school scrip issued by the Board of Education of Chicago in the amount of $530, with interest thereon, less a $10 payment. March 25, 1935, there was a trial before the court without a jury and a finding and judgment against both defendants for $619.70. The judgment "finds the issues for the plaintiff and against the defendant Arthur Frankenstein in trover and assesses the plaintiff's damages at the sum of" $619.70. The court in the judgment also found the issues in favor of plaintiff and against the defendant Rudolph Frankenstein, "and assesses the plaintiff's damages at the sum of" $619.70 *** "and now the defendants enter herein their motion for a new trial in this cause." April 27th both defendants filed their written motion for a new trial specifying particular grounds. May 7th the court entered an order in which it is recited that the cause came on to be heard; that the court heard all the evidence and

"ORDERS:-

1. That the motion of the Defendants for a new trial be, and the same is hereby overruled on the findings of March 25, 1935;

2. That judgment on the findings of March 25, 1935, be, and the same is hereby entered for the Plaintiff and against the Defendant, RUDOLPH FRANKENSTEIN, in the sum of" $619.70, "said judgment being in Assumpsit and based on Count One (1) of Plaintiff's Complaint;

3. That judgment on the findings of March 25, 1935, be, and the same is hereby entered for the Plaintiff and against the Defendant, ARTHUR FRANKENSTEIN, in the sum of" $619.70 - "and costs

[illegible]

[illegible]

[illegible]

of suit, said judgment arising out of the wilfull conversion by said Defendant, ARTHUR FRANKENSTEIN, of the personal property of the Plaintiff in manner and form as charged in Count Two (2) of the Plaintiff's Complaint."

The order fixed the amount of the appeal bond at $1000. On the same date, May 7th, defendant Arthur M. Frankenstein, filed a notice of appeal. Then follow other notices, orders, etc., which are not important here. May 29th defendant Arthur M. Frankenstein filed his appeal bond which was duly approved by the trial Judge. On the same day another order was entered in which it is recited that on March 25, 1935, on the hearing of the case, the court had found in favor of defendant Rudolph Frankenstein and dismissed him from the case; but by mistake of the clerk the record showed that a judgment was entered against this defendant and it was ordered that the judgment be corrected accordingly. Defendant Arthur M. Frankenstein prosecutes this appeal.

The record discloses that plaintiff was employed by the Board of Education as a teacher in the city schools. The Board was short of funds and issued to plaintiff what is designated as "scrip" for the amount due plaintiff for services she had rendered as a teacher. The defendants were practicing lawyers, father and son, in Chicago, and plaintiff had, about a year before, employed defendant Arthur M. Frankenstein, who represented her in a matter which apparently is still pending.

Plaintiff testified that Arthur M. Frankenstein, who will hereinafter be referred to as the defendant, called her on the telephone the latter part of November, 1931, and asked her if she had any "school scrip or tax warrants;" that she replied she had, and he asked her, "Do you want real money" for them? and she replied in the affirmative; that he then told her to come down to the office; that the next day she took the scrip with her and went to his office expecting to receive cash for the scrip; that defendant told her he had sold a boat he owned; that he expected

of suit, this judgment against not of the district convertible by said defendant, LUCIUS VANDERCOOK, of his personal property of the Plaintiff in another and two so charges in doubt the (1) of the Plaintiff's complaint.

The order filed the answer of the appeal had as given. On the same date, May 7th, defendant ARTHUR E. Frankenstein, filed a motion of appeal. Then follow other motions, orders, etc., which are not important here. May 28th defendant ARTHUR E. Frankenstein filed his appeal bond which was duly approved by the trial judge. On the same day another order was entered in which it is recited that on March 22, 1922, on the hearing of the case, the court had in favor of defendant Harlan Frankenstein and dismissed him from the case; but by mistake or due clerk the record shows that a judgment was entered against this defendant and it was evidence that the judgment is erroneously. Defendant argues E. Frankenstein prosecutes this appeal.

The record discloses that plaintiff was employed by the Board of Education as a teacher in the city schools. The board was short of funds and issued to plaintiff what is designated as "scrip" for the amount due plaintiff for services she had rendered as a teacher. The defendants were prosecuting lawyers, father and son, in Chicago, and plaintiff had, about a year before, employed defendant ARTHUR E. Frankenstein, who represented her in a matter which unnecessarily is still pending.

Plaintiff insisted that ARTHUR E. Frankenstein, who will hereinafter be referred to as the defendant, collect her on the telephone the latter part of November, 1921, and asked him if he had any "school scrip or tax warrants." That she rightly was had, and he asked her, "Do you want real money" (or words not so exploding in the alternative; that he knew that he on some law in the action; that the next day she took the scrip with her and went to his office expecting to receive such for the scrip; that defendant told her he had sold a book to cement; that he reported

the purchaser to bring in the money but that he had not yet arrived; that if plaintiff would endorse the scrip and leave it with him he would give her the cash which he expected to receive from the purchaser of the boat, and that in the meantime he would give her a guarantee of his father that she would receive the money for the scrip. He also gave her three checks, one dated December 7, 1931, for $100; one January 15, 1932, for $200, and a third dated March 1, 1932, for $238, each payable to plaintiff. Plaintiff endeavored to get the money from defendant from time to time, called on the bank on which the checks purported to be drawn but found that defendant had no money in the bank; that she received nothing from the defendant except that at one time he paid her $10.

The evidence further shows that on the same day plaintiff delivered the scrip to defendant he borrowed $300 from a friend, pledging the scrip as security, and later part of the scrip was sold by the pledgee in part satisfaction of the $500 loan.

Defendant testified he was an attorney at law and had represented plaintiff in some litigation which was still pending, but which suit was not to be tried; that he received a yacht in payment of a fee and was informed that the best place to sell the yacht was New York; that he had no money to go to New York; that plaintiff had no money but had the scrip which at that time was "valueless"; that he informed plaintiff that some persons would accept the scrip in payment of rent and in payment of bills, and "she told me that she would be glad to loan me the scrip;" that she was in his office on another matter and afterward brought the scrip down to him; that thereupon he gave her the checks, as above stated, and had them post dated because he did not have money at that time in the bank to meet them. On cross examination he said the yacht was at Miami; that he borrowed $250 or $300 from his friend and gave the scrip as collateral security.

The petitioner is trying to the money but that is not yet certain; that it plaintiff would welcome the money and leave it with him he would give for the case which he proposed to receive from the petitioner at this time, and that in the meantime he would give her a promissory of the firm that the trial receive the money for the party. In any event but leave clearly, not dated December 7, 1921, for $100; one January 15, 1922, for $100, and a third dated March 1, 1921, for $200, each payable to plaintiff. Plaintiff asserted to get the money for defendant from the time he came, relied on the fact on which the whole proceeding is to depend but found that defendant had no money in the world; that she received nothing from the defendant except that at one time he paid her $20.

The evidence further shows that on the same day plaintiff delivered the party to defendant he received $300 from a friend, pledged the party as security, and taken part of the party was said by the pledgee in part satisfaction of the $300 loan.

Defendant testified he was an attorney at law and had considerable property in some Illinois which was still pending, but which suit was not in be tried; that he received a point in payment of a fee and was interested that he been place to sell the point was New York; that he had no money to go to New York; that plaintiff had no money but had the party which at that time was "valuable"; that he informed plaintiff that some persons would accept the party in payment of rent and to negotiate at sale, and "she said to me that she would be glad to have me do the party;" that she was in the office on another matter and returned through the party from to him; that thereupon he gave her the receipts, he share stated, and had given her $300 because he did not have money at that time in the bank to meet them. He stated emphatically he sold the point was of Miami; that he borrowed $300 of $300 from his friend and gave the party as collateral security.

Defendant's friend, Harry L. Oppenheimer, testified that he was a public accountant and had known defendant for many years; that he lent defendant $500 and received the scrip of the face value of $550 as collateral to defendant's note; that he sold part of the scrip and took judgment for the balance of the note but had been unable to have the judgment satisfied.

Defendant's theory of the case was that plaintiff sold him the scrip on credit, although he testified, as above quoted, that plaintiff said she would loan the scrip to him, and that he had not converted it to his own use as plaintiff contends.

The trial Judge in deciding the case said: "It is exceedingly unfortunate that Counsel must become so involved financially that he must get involved in these questionable transactions.

"They have testified here Counsel received the five hundred dollars with which to extricate himself from legal difficulties and, of course, that has been contradicted by Counsel.

"The Plaintiff *** testified Counsel (defendant) called her up and said he would get her cash for the scrip ***; that defendant said, 'Come right on down.' Counsel doesn't deny that conversation. She went down and turned over her scrip to him, supposedly to use in going to New York to see about selling some yacht.

"Counsel didn't testify as to whether he used the money for that purpose or that he ever made an effort to repay this woman the money he obtained from her scrip.

"It is very apparent to me Counsel was involved financially and he was using desperate means to obtain credit or get money. He has imposed upon this woman. *** gotten her scrip and hasn't paid her anything for it. *** It was her intention he was to take it and obtain money for it. *** She relied upon him as her attorney. She had confidence in him, expected him to go out and get the money on this scrip. *** I think it was the intention of the parties, as

Defendant's father, Harry A. Vermeulen, testified that he was a public accountant and had known defendant for many years; that he had defendant's file and received the gift of the face value of $200 as collateral to defendant's note; that he sold part of the notes and took judgment for the balance of the note but had been unable to enter the judgment satisfied.

Defendant's theory of the case was that plaintiff sold him the notes on credit, although as testified, on cross-examination, that plaintiff said she would lend the money to him, and that he had transferred it to his own use as plaintiff commanded.

The trial judge in derision, but more exact: "It is somewhat difficult understand that transfer to instead (Immaculate) that he part put forward in these questionable transactions.

"They have testified that Immaculate received the five hundred dollars with which to relinquish (her first) difficulties and, of course, that has been corroborated by counsel.

"The plaintiff -- testified (Immaculate) saying that we not said he would get her out, for the money was; that defendant said, 'Come right on home.' Immaculate's story that conversation. She went home and turned over her money to him, supposedly to use in going to New York to see about selling some yarns.

"Immaculate didn't testify as to whether he used the money for that purpose or that he ever made an effort to return this woman the money he obtained from her purse.

"It is very apparent to me through the involved transaction and he was using temporary means to obtain credit at her expense. He has imposed upon this woman. -- Yellow her story and hasn't paid her anything for it. -- It was her intention he was to take it and obtain money for it. -- He relied upon the no her attorney. The had confidence in him, allowed him to go out and get the money on this story. -- I think it was the intention of the parties, as

indicated very clearly, that she expected her money within a short time after Mr. Frankenstein (defendant) had been successful in disposing of the scrip. *** these checks and written instruments don't change that situation a bit, but merely are designs on the part of Counsel (defendant) to make it appear more as a transaction between a debtor and a creditor, rather than one who has been entrusted by another to do something for her." The court further said: "These two counts in this declaration are solely in conversion and trover." The court then found in favor of plaintiff and against defendant. The record fully warrants the opinion of the trial Judge.

We think it obvious that defendant was in great need of money, and through the fact that he had represented plaintiff in the matter, as above stated, learned she had the school scrip and fraudulently planned to obtain the scrip so he could get the necessary money. His scheme in making out the checks was but a mere subterfuge to lull plaintiff into a sense of false security.

We are also of opinion that defendant's statement and testimony to the effect that he owned a yacht given to him in payment of a fee, and which yacht was in Miami, and that it could be sold in New York, was but a fabrication used by him to defraud plaintiff. Although he testified in his own behalf, nowhere does he say he disposed of the yacht or that he still had it. It is plain that plaintiff was defrauded of her scrip, and the argument made by defendant, especially coming from one who is an attorney at law, is wholly unwarranted and without a semblance of merit.

But defendant further contends (as we understand the argument) that the second count of the declaration, which is an ordinary count in trover, was insufficient to support the judgment of the court that defendant was guilty of wilfull conversion of the scrip. And in support of this counsel cite Seney v. Knight, 292 Ill. 206, and other cases.

indicated very clearly, that our erstwhile bar among within a short time after so. Tendencies [illegible] had been observed in discussing of the equity. The lines clause and written instruments don't change that situation a bit, but merely are designs on the part of Samuel [illegible] in order to cause more as a transaction between a debtor and a creditor, rather than the the bond mortgaged by another to do something for her." The court further said: "These the counts in this deliberation are solely in consideration and trust." The court then found in favor of plaintiff and against defendant. The record fully corroborate the opinion of its trial judge.

We think it obvious that defendant was in great need of money, and through the fact that had to deal represented plaintiff in the matter, so stated stated, insofar as the school auto and transportation planned to settle the auto so he could get the necessary money. The reason is noted and the Court for the a more adequate to full plaintiff into a sense of false security.

We are also of opinion that defendant's statement and testimony to the effect that he owned a Ford Coupe in the payment of a fee, and which Ford was in fact, but that it could be sold in New York, was but a fabrication and by him to defraud plaintiff. [illegible] be satisfied in his own behalf, however, here he may be disposed of the Ford or not he will not it. It is plain that plaintiff was defrauded of her money, and the judgment made by defendant, especially under fact that who is an attorney at law, is wholly unwarranted and without a semblance of merit.

The defendant further contends (in so understand the argument) that the amount paid of the deliberation, which is an ordinary sound in nature, was insufficient to support the judgment of the court that defendant was guilty of wilful conversion of the money. And in support of this contend cite Dunn v. Bailey, 98 Ill. 506, and other cases.

In the Henry case the defendant was arrested on a capias ad satisfaciendum and he appealed to the County court under the Insolvent Debtor's act for his discharge. One question was whether malice was the gist of the action. The court there said that the action in which the judgment was entered by the Municipal court was similar to an action of trover, and that while an action of trover did not ordinarily charge malice, yet a declaration of trover might be so drawn as to charge malice. We think the question is not before us. That question may properly be involved if, subsequently, there is a proceeding under the Insolvent Debtor's act. But in any event, we think the first count of the declaration alleged sufficient facts to warrant the court in finding that the defendant was guilty of a wilfull and fraudulent conversion of plaintiff's scrip. And the second count charges that defendant "contriving and intending to injure" plaintiff obtained the scrip, which is sufficient to sustain the judgment. Nor is there any merit in defendant's contention that plaintiff failed to prove that she made a demand for the return of the scrip. The law never requires the doing of a useless act and it is obvious that a demand would have been unavailing because he did not have the scrip. Nat'l Fund & Invest. Co. v. Zakos, 230 Ill. 404; Kas & Cundell Co. v. Pennsylvania Co., 291 Ill. 248.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

38663

JAMES W. BREEN,

Appellee,

v.

EDWARD J. KELLY, Mayor of the City of Chicago, ROBERT B. UPHAM, City Comptroller of the City of Chicago, GUSTAVE A. BRAND, City Treasurer of the City of Chicago, and CITY OF CHICAGO, a municipal corporation, et al,

Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT,

COOK COUNTY.

283 I.A. 640

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

On June 11, 1935, James W. Breen filed his verified petition in the Superior Court by virtue of Chapter 13, Section 13, Ill. Bar. Rev. Stat. 1933, entitled, "An act creating attorneys lien and for enforcement of same." He alleges that he was employed by the Chief Justice and the Associate Judges of the Municipal Court of the City of Chicago to institute mandamus proceedings in the Supreme Court of Illinois to compel the City Council to appropriate sufficient money to pay the lawful salaries of the Chief Justice and the Associate Judges of the Municipal Court of Chicago for the years 1932 to 1935, inclusive; that he instituted and prosecuted a mandamus proceeding on behalf of said Judges to a successful conclusion, and that as a result of said proceeding, the City Council appropriated sufficient moneys to pay to the Judges of the Municipal Court a sum of money equal to that which had theretofore been deducted and to which they were lawfully entitled.

On April 8, 1935, plaintiff herein alleges that he filed with the City Comptroller and the City Treasurer of the City of Chicago, and mailed to the Mayor of the City of Chicago, a notice of attorney's lien in which notice are set out the names of all of the Judges for whom the alleged services were rendered,

stating the amount of money alleged to have been recovered for said Judges, claiming a lien to the sum of money ordered paid and appropriated in pursuance of the writ of mandamus and for a reasonable amount for attorney's fees for services rendered by him as attorney of record for the relators in the Supreme Court of the State of Illinois.

Plaintiff further alleges that certain of said Judges have refused and still refuse to pay him a reasonable fee for services performed by him, and that if the City Comptroller delivers any check or checks to said Judges, and if the check or checks are cashed by said Judges, that plaintiff's right to a lien will be defeated.

Plaintiff prays that the Court set the matter for hearing to determine the amount of a reasonable fee and that upon the determination of said reasonable fee that the court order the City Comptroller to pay said amount to plaintiff out of the moneys due said Judges and that until such time as the amount of plaintiff's fees is determined, the City Comptroller and the City Treasurer should be restrained by an injunction from delivering or paying any checks, vouchers or money out of funds appropriated for the payment of salaries for the years 1932 to 1935 inclusive.

It further appears from the petition that in the case of People of the State of Illinois, ex rel John H. Lyle, et al v. City of Chicago, et al, No. 22799, the Supreme Court ordered and directed a peremptory writ of mandamus to issue, compelling the City Council of the City of Chicago to appropriate a sufficient sum of money in order to have sufficient funds on hand with which to pay the said Chief Justice and said Associate Judges of the Municipal Court of Chicago their lawful salaries for the years 1932, 1933, 1934 and 1935; that after the service of the mandate

of the Supreme Court upon the members of the City Council of the City of Chicago they consented to and did appropriate sufficient money to enable the City Comptroller and City Treasurer to have funds on hand out of which to pay the said Chief Justice and the said Associate Judges of the Municipal Court.

Plaintiff further alleges that some of the above named defendants are attempting to force and coerce the City Comptroller to deliver their checks for the amount of money due them and plaintiff believes that the said Comptroller may be coerced to deliver the said checks, unless the said Comptroller is ordered and directed to retain possession of said checks in said fund so appropriated until the rights of plaintiff, by virtue of the service of his notice of lien, are adjudicated and determined.

An order for a temporary injunction was entered June 15, 1935, enjoining and restraining the City Comptroller from delivering checks and the City Treasurer from paying "any money out of the fund of two hundred thirty thousand, two hundred sixteen and 20/100ths dollars ($230,216.20) for the payment of back salaries of the Chief Justice and Associate Judges of the Municipal Court of Chicago for the years 1932, 1933, 1934 and 1935, in excess of seventy-five per cent until a hearing is had upon the petitioner's Petition to Enforce Attorney's Lien for services rendered in procuring a Writ of Mandamus in the Supreme Court of the State of Illinois." No appeal was taken from this order.

On July 10, 1935, a motion was made by the defendants, Edward J. Kelly, Mayor of the City of Chicago, Robert S. Upham, City Comptroller, and Gustave A. Brand, City Treasurer, to strike from the petition such parts thereof as pray for an injunction restraining the City Comptroller and the City Treasurer from delivering or paying any checks to said Municipal Court Judges.

of the Supreme Court upon the members of the City Council of the City of Chicago they convened to see the appropriation restricting money to enable the City Comptroller and City Treasurer to have funds on hand out of which to pay the said Guiar Trustee and the said Associate Judges of the Municipal Court.

Plaintiff further alleges that one of the above named defendants are attempting to force and compel the City Comptroller to deliver their checks for the amount of money due them and plaintiff believes that the said Comptroller may be induced to deliver the said checks, unless the said Comptroller is enjoined and directed to refrain consideration of said checks in said from be apprehended until the rights of plaintiff, by virtue of the action of his notice of lien, are adjudicated and determined.

In order for a temporary injunction to issue herein it, that, upon hearing and presentation the City Comptroller from delivering the City Comptroller and the City Treasurer from the payment of said checks, and the City Treasurer from the payment of money for the said Guiar Trustee and the said Associate Judges of the Municipal Court Judges.

the City of Chicago they convened to see the appropriation restricting money to enable the City Comptroller and City Treasurer to have funds on hand out of which to pay the said Guiar Trustee and the said Associate Judges of the Municipal Court.

Plaintiff further alleges that one of the above named defendants are attempting to force and compel the City Comptroller to deliver their checks for the amount of money due them and plaintiff believes that the said Comptroller may be induced to deliver the said checks, unless the said Comptroller is enjoined and directed to refrain consideration of said checks in said from be apprehended until the rights of plaintiff, by virtue of the action of his notice of lien, are adjudicated and determined.

In order for a temporary injunction to issue herein it, that, upon hearing and presentation the City Comptroller from delivering the City Comptroller and the City Treasurer from the payment of said checks, and the City Treasurer from the payment of money for the said Guiar Trustee and the said Associate Judges of the Municipal Court Judges.

On July 8th, 1926, a meeting was held in the auditorium, Edward J. Kelly, Mayor of the City of Chicago, Robert E. Gibson, City Comptroller, and Andrew J. Lynch, City Treasurer, he write from the petition such letter thereof be sent for an injunction restraining the City Comptroller and the City Treasurer from delivering or signing any checks to said municipal Court Judges.

On July 11, 1935, an order was entered by stipulation between the parties that one of the Judges, Thomas A. Green, having adjusted the question of fees, that the injunction be modified so as to exempt the back salary of said Judge Green.

On August 9, 1935, an order was entered by agreement that the cause be set for trial and continued until September 16, 1935, when it was again continued until September 25, 1935. On September 25, 1935, said motion to strike the petition was continued until October 4, 1935.

On October 3, 1935, some of the defendants made a motion to strike the plaintiff's petition and certain parts thereof. Thereafter on October 4, 1935, the plaintiff served notice that he would move the court to overrule the motion heretofore filed to strike the Petition of the plaintiff. In support of said motion an affidavit was filed setting forth the history of the case up to that time.

Thereafter on October 15, 1935, the Judges of the Municipal Court made a motion to dissolve the temporary injunction issued on June 15, 1935, and alleged some 8 reasons therefor.

October 24, 1935, the motion coming on to be heard, the court indicated that instead of tying up between $50,000 and $60,000 in the Comptroller's office, that he would limit the amount enjoined to $18,000 and directed counsel on both sides to prepare an order to that effect.

Thereafter, as appears by the affidavits filed in this court, the attorneys for the defendants prepared an order and without notice to the plaintiff's attorney presented it to the court and had the same entered. This order was not abstracted in full in this court and we are, therefore, compelled to obtain its contents from the record. It reads as follows:

On July 12, 1988, an order was entered by stipulation between the parties that one of the judges, Thomas L. Brown, having adjudged the question of fact, that the injunction be modified so as to exempt the work salary of all judge issues.

On August 3, 1989, a order was entered by agreement that the cause be set for trial and continued until September 12, 1989, when if not again continued until September 26, 1989. On September 22, 1989, said motion to strike the petition was continued until October 1, 1989.

On October 3, 1989, some of the defendants made a motion to strike the plaintiff's petition and motion para. Entered. Thereafter on October 4, 1989, the plaintiff served notice that he would move the court to strike the motion interrogatories filed to strike the petition of the plaintiff. In account of said motion as affidavit was filed stating that the history of the case up to this time.

Thereafter on October 12, 1989, the judge of the Bexleigh Court made a motion to dismiss the temporary injunction issued on June 12, 1989, and filed some 6 reasons therefor.

October 24, 1989, the motion coming on to be heard, the court indicated that instead of fixing it between 200,000 and 300,000 in the Templeton's office, that he would limit the amount applied to 125,000 and directed counsel on both sides to prepare an order so that effect.

Therefore, as appears by the affidavits filed in this court, the attorneys for the defendants prepared an order and without notice to the plaintiff's attorney presented it to the court and got the same entered. This order was not submitted in full in this court and as such, therefore, consisted to obtain the evidence from the record. It reads as follows:

"STATE OF ILLINOIS, }
COUNTY OF COOK } SS.

SUPERIOR COURT THEREON

JAMES W. BREEN vs. EDWARD J. KELLY, mayor of the city of Chicago, ROBERT B. UPHAM, city comptroller of the city of Chicago, GUSTAVE A. BRAND, city treasurer of the city of Chicago, and CITY OF CHICAGO.	NO. 35 S 8781

O R D E R

This day comes the petitioner, James W. Breen, in his own proper person and also come the respondents, Edward J. Kelly, Mayor of the City of Chicago, Robert B. Upham, city comptroller of the city of Chicago, Gustave A. Brand, city treasurer of the City of Chicago, and the City of Chicago, by Barnet Hodes, Corporation Counsel, and Hiram T. Gilbert, their attorneys, and the respondents, John J. Sonsteby, Chief Justice of the Municipal Court of Chicago and N. J. Bonelli, William Brooks, Leon Edelman, F. W. Elliott, Gibson E. Gorman, Justin F. McCarthy, Joseph H. McGarry, Harold P. O'Connell, Frank M. Padden, John J. Rooney, Edward S. Scheffler, J. A. Schiller, John Sutknecht, Matthew D. Hartigan, Lambert G. Hayes, Michael G. Kasper and Irwin J. Hasten, Associate Judges of the Municipal Court of Chicago by Hiram T. Gilbert and David Silbert, their attorneys, and thereupon the Court orders that the motion heretofore entered by the respondents, the Chief Justice and the Associate Judges of the Municipal Court of Chicago for the dissolution of the injunction heretofore granted in this cause on the 15th day of June, 1935, as modified on July 11, 1935, be and it is hereby sustained. Said injunction is dissolved accordingly.

It is further ordered by the Court of its own motion and against the objection of the respondents, the Chief Justice and the Associate Judges of the Municipal Court of Chicago, that the comptroller and treasurer of the city of Chicago, out of the moneys now in their hands or under their control, or which may hereafter come into their hands or under their control as such comptroller and treasurer of the city of Chicago, belonging to the City of Chicago and applicable to the payment of the salaries of said above named Chief Justice and Associate Judges of the Municipal Court of Chicago, withhold from said Chief Justice and Associate Judges the sum of $18,000 due them collectively until the further order of this court.

ENTER:

(Signed) Francis B. Allegretti
Judge."

This order was admittedly prepared by the defendants, entered and without notice to plaintiff or his attorney, (in this case the same), as required by the rules of the Superior Court, and in his absence and without his consent.

A motion was made by the plaintiff to dismiss this appeal in this court, which was continued to a final hearing.

It is the contention of counsel for the defense that the last paragraph of the above order was a new injunctional order from which he has perfected this interlocutory appeal. It is quite apparent from a reading of the entire order that it is and should be construed as an amendment of the original order of June 18, 1935, and by its terms limits and circumscribes the terms of the original order.

The statute on appeals, Chapter 110, Section 308, Ill. Rev. Bar Stat. 1935, reads as follows:

> "Whenever an interlocutory order or decree is entered granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken therefrom to the Appellate Court * * *."

This statute as will be seen provides that appeals will lie from injunctional orders or other orders enlarging the terms of existing injunctional orders. In this case it is quite apparent from a reading of the entire order that it did not enlarge the terms of the former order but, as heretofore stated, circumscribed and limited its effect. Assuming for the sake of argument and from counsel for defendants' position, that the latter part of the order, which is the only part contained in the abstract of the record, is a new and separate injunctional order, then Rule 31, Chapter 110, Par. 255, Ill. Bar Rev. Stat. 1935, provides as follows:

This order was subsequently returned by the defendants, and entered without notice to plaintiff or his attorney. In this case the order, as required by the rules of the circuit court, was in his absence and without his consent.

A motion was made by the plaintiff to dismiss this appeal in this court, which was continued to a final hearing.

It is the contention of counsel for the defendants that the last paragraph of the above order was a new injunctional order from which no appeal has intervening appeal. It is quite apparent from a reading of the entire order that it was not intended to constitute an injunction of the original order of June 12, 1888, and by its terms leaves the circumstances the status of the original order.

The statute on appeals, chapter 110, section 107, Ill. Ann. Stat. 1896, reads as follows:

> "Appeals or interlocutory orders or decrees in injunctions, or appointing a receiver, or refusing the same, or ordering the sale of an injunction order, or dissolving a receiver, or giving other or further orders or directions as a receiver shall consider, or refusing to do so, may be taken in the appellate court."

This statute is well in mind whether that appeals will lie from injunctional orders or other orders modifying the terms of existing injunctional orders. In this case it is to make apparent from a reading of the entire order that it did not enlarge the scope of the former order but, on interlocutory appeal, circumscribed and limited its effect. Assuming for the sake of argument and from general for determination' sanction, that the latter part of the order, which is the only part mentioned in the abstract of the record, is a new and separate injunctional order, then Rule 12, Supreme Ill. Ill. Ann. Stat. 1896, provides as follows:

> "Where an interlocutory order or decree is entered on an ex parte application, the party proposing to take an appeal therefrom shall first present, on notice, a motion to vacate the order or decree to the trial court entering such order or decree."

Therefore, no appeal can be permitted until a motion is first made in the trial court to dissolve the injunction. This was not done, so that in any view one may take of the order, an appeal from the action of the trial court will not lie.

We are not passing upon the question as to whether or not an injunction should have been issued in the first instance, but simply upon the record as it is presented to us for review.

The motion of the plaintiff Green to dismiss the appeal is granted and for the reasons heretofore indicated, the appeal of the defendants from the interlocutory injunctional order of the Superior Court, is hereby dismissed.

APPEAL DISMISSED.

HALL, P.J. AND HEBEL, J. CONCUR.

"There are individuals right or wrong in
matters on an equating circumstances. The people
responsible for this or other innovations could first
prevent, or unless, I notice to change the order
as shown in the total count certain such order
or decree."

Therefore, no longer and to preliminate until : notice is first made
in the total count to discovery the situation. This was not done,
so that in our view some any time of the order, no longer from
the action of the total count will not lie.

We are not deciding that the question is to whether or
not an injunction should lie; that lieuent is the first instance,
but simply when the result is it is premature to do the review.

The motion of the defendant moves to dismiss the
appeal is granted and for the reasons hereinbefore indicated, the
appeal of the defendants from the interlocutory injunction
order of the Superior Court, is hereby dismissed.

(Final Signature)

Hill, P.J., Ian Menzies, J., concurs.

38287

ROY BELEY,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 640

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a suit upon an accident insurance policy issued by defendant, had a verdict for $740, and defendant appeals.

The policy provided for the payment of $50 a week for total disability caused by accident and $25 a week for partial disability. Plaintiff claims that on October 26, 1933, he sprained his ankle, totally disabling him to December 10, 1933, and partially disabling him from that date to March 22, 1934. He claims the amount provided for in the policy for such disability. Defendant asserts that the policy had lapsed and was not in force at the time of the accident, hence disclaims any liability.

The policy was issued to plaintiff November 20, 1930; it provides that in consideration of statements in the application and the payment of the premium of $83.55, defendant insures plaintiff for the term of twelve months from November 20, 1930, against the results of injuries sustained "while this policy is in force" and caused by accident. The policy also contains a provision that it may, with the consent of the company, subject to the conditions of the policy, "be periodically renewed upon each successive expiration, for a further period of equal number of months, upon the payment of the premium herein stated, as the premium for each such successive renewal." There was a further provision that upon each such renewal a grace of thirty-one days would be granted for the payment of the premium, "during which period the insurance shall continue in force provided such payment is made within such

period of grace."

The first payment of premium paid for insurance from November 20, 1930, to November 20, 1931; at the expiration of that year the policy was renewed for another year by the payment of the premium; this carried the policy to November 20, 1932; at this latter date, apparently, plaintiff was not in funds to pay the premium for the entire succeeding year; he therefore requested the payment of premiums might be made semi-annually instead of annually, and this was consented to by defendant; he then paid $27.85, which carried the insurance to May 20, 1933, when the next premium became due. Defendant sent his s "Premium Notice" that the next premium, amounting to $27.85, would fall due May 20, 1933, covering the following six months period. This notice also contained the following:

"Unless said premium is paid on or before said date due, or within a grace period of 31 days thereafter, the said policy will expire and cease to be in force or effect.

Do not permit your policy to lapse if Agent should fail to call. Remit premium to District Office or to Home Office, 1 Madison Avenue, New York City."

At the same time there was sent from defendant's main office in New York City to the Chicago branch a "Premium Receipt" which was to be delivered to the plaintiff upon payment of the premium due May 20, 1933. This recites that receipt of the premium continues the policy in force from noon of the "date due" and for the "period stated" provided the payment is made on or before the date due or within thirty-one days thereafter. The "date due" is shown in the body of the receipt as May 20, 1933, and the "period stated" is six months. The records of defendant show that this "Premium Receipt" was returned to the main office, the premium not having been paid.

October 17, 1933, plaintiff issued his check for $27.85 and mailed it with the "Premium Notice" to the district office of the defendant in Chicago, where they were received the following

period of grace."

The first payment of [illegible] was received on December 20, 1920, in December 20, 1921; the application of that year the policy was renewed for another year by the payment of the premium; this carried the policy to December 20, 1922; in this latter date, apparently, liability was set in force by the premium for the entire succeeding year; on December [illegible] the payment of premium was alleged to make continuously instead of annually, but this had ceased to be the instrument; in the Dale City, N. Y., [illegible] the insured on May 20, 1923, when the next premium became due. December sent him a "Premium Notice" that its next premium, amounting to $[illegible], would be due May 20, 1924, requiring the claimant his [illegible] [illegible].

"Unless this premium is paid to us within thirty days, or within a grace period of 31 days thereafter, the insurance will cease and terminate."

The [illegible] policy was [illegible] to pay.

At the same time [illegible] "Dividend", with [illegible] Tree in New York City, in his welcome issued a "Premium Receipt" which was to be delivered to the claimant upon payment of the premium due May 20, 1923. This stating that payment of the premium continues the policy in force from date of the "Life Day" and the "period grace" provided the payment is made on or before the date due or within thirty-one days thereafter. The "Life Day" is given in the body of the receipt as May 20, 1924, but the "period grace" is six months. The records of delivery may will this "premium receipt" was returned to the [illegible] office. No evidence was [illegible] been paid.

Under [illegible], December [illegible] and called it also the "Premium notice" in the district office of the defendant in Dallas, there they were requested [illegible] [illegible]

day. This was approximately five months after May 30th, when the semi-annual premium was due. The manager of defendant's district office ordered that the check be returned to plaintiff. Plaintiff says he sprained his ankle on October 25th, or a few days after he sent the check to defendant. David Greenrock had solicited the insurance from plaintiff and he took the check with him to the home of plaintiff on October 29th; he offered the check to plaintiff, who refused to accept it; the next morning Greenrock gave the check back to the district manager, who wrote a letter to plaintiff dated November 14th, returning the check and stating that because of the failure to pay the premium due May 30, 1933, or within the grace period, the policy had lapsed.

Plaintiff first makes the proposition that where there is no express or direct provision for the forfeiture of the policy for failure to pay a fractional part of the premium, the policy cannot lapse until the expiration of the current policy year and the thirty-one days of grace. It is said that this is supported by Bolton v. Standard Life Ins. Co., 219 Ill. App. 177. The policy in that case was a life insurance policy. The instant policy is what is called a "successive term" policy, in which each premium is a payment for the insurance during the term for which payment is made and not for a subsequent period. Moreover, in the Bolton case the entire, or annual, premium did not become due or payable until the end of the then current policy year, with the clear inference that the policy would not lapse until all the annual premium was due and unpaid and the period of grace had expired without premium being paid. Both the Bolton case and Ingersoll v. Mutual Life Ins. Co., 186 Ill. App. 568, cited by plaintiff, have been distinguished in John Hancock Mut. Life Ins. Co. v. Chevillon, 45 Ned. (2d) 940. In that case the court called attention to the types of policies in these cases, saying that the policies there involved were limited payment life

day. This was approximately five months after May 20th, when the semi-annual premium was due. The manager of defendant's district office stated that he could be contacted by plaintiff. Plaintiff was in Atlanta, Georgia on October 25th, or a few days after he sent the money to defendant. David Strouse had solicited the insurance from plaintiff and is now the agent with the in the case of plaintiff or defendant (?); he advised the agent to plaintiff, who returned to Moody AFB; the first medical department was the check back to the district manager, who wrote a letter to plaintiff dated November 11th, refusing, for which we stating that because of the failure to pay the premium for May 20, 1951, or within the grace period, the policy had lapsed.

Plaintiff first sued for the benefits that were due in accordance of legal provisions for the forfeiture of the policy for failure to pay a premium when or the grace period, the policy expired based upon the constitution of the mutual policy and the liberal one day of grace. It is held that this is supported by Lilly v. Standard Life Ins. Co., 50 Ga. App. 177. The policy in that case was a life insurance policy. The insured policy is what is called a "successive term" policy, in which each premium is a payment for the insurance during the term for which payment is made and not for a subsequent period. However, in the Lilly case the policy or mutual, premium did not become due or payable until the end of the first month following year, also the clear intention that the policy would not lapse until all the second premium had not elapsed and the period of grace had expired without premium being paid. In the Lilly case the Lilly v. Standard Life Ins. Co., 50 Ga. App. 177, 178, 179, cited by plaintiff, have been distinguished in Cone v. Mut. Life Ins. Co. v. Martin, 42 Ga. (2d) 8. In that case the court called attention to the type of policies in question, saying that the policies there involved were limited payment life

policies and not successive term policies. It was also noted that in the Kolton case there was a course of dealing between the company and the policy holder which it was held waived any forfeiture.

The policy in the instant case was a successive term policy whereby the insured purchased insurance for a limited period of time and for no time subsequent to the expiration of that period. It was like the policy involved in MacArthur v. U. S. Health and Accident Ins. Co., 151 Ill. App. 507. That was an accident policy which provided for renewals for such lengths of time as payments of premiums, which the insured might make, would maintain the policy and insurance in force. It was said that whether or not the policy would be renewed was optional with the insured, and that if he did not exercise this option by paying the premium for a further period there was no renewal and no insurance. And the opinion concludes:

> "Each renewal being a new and independent contract of insurance and plaintiff, when ** he was injured not having renewed his contract for insurance so as to cover that date, was then without any insurance."

To the same effect are Amos v. Public Life Ins. Co., 239 Ill. App. 427, and Teninka v. Minnesota Mutual Life Ins. Co., 169 Minn. 75. In this last case it was said of a similar situation:

> "There is no forfeiture in any proper sense. The insurance has no existence from year to year except for the premium payments essential to its continuance. Equitable L. Ins. Co. v. Girard L. Ins. Co., 100 Pa. 172, 180. The insured's omission to pay a premium forfeits nothing. He but fails to exercise his option to purchase an extension. That is no more forfeiture than is the failure of a lessee to renew a lease which he has the option to renew merely by prepayment of a stipulated rent."

See also Minnesota Mut. Life Ins. Co. v. Cost, 72 Fed. (2d) 519.

We hold that when the time of payment of premiums was changed to semi-annual payments this had the effect of changing the periods of insurance covered by the policy from periods of one year to periods of six months, and that the payment made for six months insurance in December, 1932, bought insurance for the six months period ending May 20, 1933, and for no longer time, except as to the thirty-one days' grace.

Plaintiff, however, claims that there was a previous course of dealing between him and the company which wrought a waiver of any lapse by reason of non-payment of the premium. This claim is based upon the showing that when the premium for the third renewal fell due on November 20, 1932, which with thirty-one days grace would bring it to December 20th, defendant accepted the payment of this premium December 24th, or four days thereafter. This single instance does not justify the claim of any course of dealing, and certainly a delay in payment of four days is no reason for believing that a delay of five months was permissible.

Plaintiff asserts that Grenrock, who had solicited the insurance, made a statement to plaintiff which amounted to a waiver of the obligation to make prompt payments. Plaintiff testified that Grenrock told him not to worry about the Metropolitan Life Insurance Company, "because if you haven't got all the money, before the year is up you can pay the balance." Grenrock denied making any such statement, and there are a number of reasons why it cannot be considered as a waiver of the due date of the premiums. The alleged statement by Grenrock itself is indefinite, especially in view of the written notice to the insured that the semi-annual premium was due May 20, 1933, and that his policy would lapse if it was not paid on that date. Moreover, the policy contained a provision that no agent had any authority to change its provisions or to waive them, and that no change would be valid unless approved by an executive officer of the defendant company and such approval indorsed on the policy. There was no ambiguity with reference to the time of payment which would call for any explanatory parol evidence. We hold there was no waiver of the obligation of the plaintiff, if he wished to renew the policy, to pay the semi-annual premium on May 20, 1933, or within thirty-one days thereafter.

There is also some argument to the effect that when the

Plaintiff, however, claims that there was a previous course of dealing between him and the company which should waive if any impose by reason of non-payment of the premium. This claim is based upon the alleged fact that when the premium was due the insured left the company at Jiro, where his residence then stood, and went to Tsumeb-Otji, Germany West Africa, intending to return to Jiro before December 31st, or from some intermediate. This claim is unsupported by the evidence, but plaintiff contends that a course of dealing is proved by the fact that the insured, not actually a resident of any place or country, was habitually a caller in payment of his premium in order to prevent the policy from lapsing.

Plaintiff argues that therefore, the company waived the insurance, with a reference to plaintiff which resulted in a waiver of the obligation of such premium payment. Plaintiff contends that Exhibit 11 is proof of this fact. Exhibit 11 is a letter from the Philadelphia Life Insurance Company, "Because if you haven't got all the money, bring the part in as you can pay the balance." Assuming doubtful validity, the evidence, and there are a number of reasons why it cannot be presented as a waiver of the rule of the policy. The alleged statement by Hermann itself is inadmissible, regardless of the writing which is the insured from the well-known circumstances the day it, first, not more than sixty hours in it was not paid on that date. Moreover, the policy contained a provision that no agent had any authority to change its provisions or to waive them, and that no waiver which be valid unless endorsed by a responsible officer of the Philadelphia Company and made apparent indorsed on the policy. There was no evidence that relations in the life of a person such which would lift for any violation plaintiff or Hermann. In fact there was no waiver of the obligation of the assured, if he wished to renew the policy, in any the manner which was in his power, either direct or through the insurance.

There is also some argument as the effect that when the

defendant received plaintiff's check on October 14, 1933, and did not attempt to return it until October 29th, this was a retention of the check beyond a reasonable time which amounted to an acceptance. We cannot agree with this contention. It was very natural that Grenrock, who had known plaintiff for some years, should call upon him to return the check in person and if possible to secure a renewal of the insurance. Grenrock testified that when he called on plaintiff on October 29th he explained that he had attempted to call on him a few days sooner but was unable to do so, that he tendered the check to plaintiff, who would not accept it. Grenrock testified that he told plaintiff that inasmuch as the grace period had expired on June 30th or 31st, the policy had lapsed, and the only thing the company could do was to rewrite the policy after plaintiff recovered from his sprained ankle. Under these circumstances it cannot be said that the defendant retained the check an unreasonable length of time before attempting to return it to plaintiff. The check was subsequently returned to plaintiff on November 14th and retained by him.

Defendant complains of an instruction given to the jury at the request of plaintiff to the effect that if an "authorized officer" agreed to accept the second premium at any time during the year and plaintiff tendered his check within the year, such tender constituted payment and the policy would be in full force. There was no evidence that Grenrock was an authorized officer with power to waive any of the provisions of the policy, and, in fact, no evidence that there was any agreement that plaintiff could pay the premium at any time during the year. This instruction was wholly misleading.

The position of the plaintiff seems to be that he is liable for the amount of the premium falling due May 30, 1933, and that defendant may recover it. However, no cases are cited in support

Defendant received plaintiff's check on October 21, 1938, and did not attempt to return it until October 24th. Also was a extension of the check beyond a reasonable time which amounted to an acceptance. We cannot give this this consideration. It was very unlikely that Greenback, who had never plaintiff for some years, should call upon him to return the check to payee, and if possible to secure a renewal of the insurance. Greenback testified that when he called on plaintiff on October 25th he informed that he had attempted to mail an a for more premium but was unable to do so, that he therefore thought he in plaintiff, the agent, had received it. Defendant testified that he told plaintiff that inasmuch as the premium had expired on June 25th of that, the policy had lapsed, and the agent said the company would do was to reinstate the policy after plaintiff recovered from his extreme illness. Under these circumstances it cannot be said that the defendant violated the rules of reasonable diligence of the policy requiring to return it to plaintiff. The date the insurance premium is payable on November 24th and retained by him.

Defendant complains of an instruction given at the instance of the receiver of plaintiff to the effect that if an "authorized officer" agreed to accept the annual premium at any time during the year and plaintiff received the check within the year, such tender constituted payment and the policy would be in full force. There was no evidence that Greenback was an authorized officer with power to waive any of the provisions of the policy, and, in fact, no evidence that there was any agreement that plaintiff could pay the premium at any time during the year. This instruction was misleading.

The position of the plaintiff seems to be that he is liable for the amount of the premium falling due May 24, 1938, and that defendant negligence it. However, no cause are cited in support

of this and we cannot conceive how, under the circumstances, the Insurance company could force the plaintiff to pay this.

Defendant also argues that the policy provides that written notice of injuries must be given to the company within twenty days after the date of the accident and that affirmative proof of loss must be furnished the company within ninety days after the date of such loss, and that no such notices were given within the required time. To this the plaintiff properly replies that in view of defendant's letter of November 14th, disclaiming any liability on account of the lapse of the policy, it was not necessary for the plaintiff to make the proofs of loss as required by the policy.

For the reason that the policy had lapsed at the time plaintiff was injured, and that there was no waiver of its provisions with reference to payment of the premium and no acceptance of such premium, plaintiff is not entitled to recover for the injuries received as claimed. The judgment is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, J., concurs.

Matchett, J., dissents: I think defendant is liable by reason of its retention of the check, and that the question of whether defendant waived prompt payment of the premium was, under the evidence, for the jury.

of this and its counsel concerning the, which has disappeared, the insurance company could have the plaintiff in any time.

Defendant also argues that the policy provides that written notice of injuries must be given to the company within twenty days after the date of the accident and that affirmative proof of loss must be furnished the company within ninety days after the date of loss, and that no such notice was given within the required time. In this the plaintiff properly replies that in view of defendant's issue of instructions, investigation and liability on account of the death of the insured, it was not necessary for the plaintiff to make the strict or less so insisted by the policy.

For the reason that the policy had lapsed at the time plaintiff was injured, and that there was no waiver of its provisions with reference to payment of the premium and no indication of good faith, plaintiff is not entitled to recover for the injuries received as claimed. The judgment is therefore reversed and the cause is remanded.

REMANDED FOR DETERMINATION.

O'Connor, J., concurs.

Natcuell, C., dissents: I think defendant is liable by reason of its rescission of the policy, and that the question of whether defendant waived strict payment of the premium, under the circumstances, for the jury.

38312

HARRY SARGENT,
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 640

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on two policies issued by defendant, claiming payments under the policies for total and permanent disability; upon trial he had a verdict for $733, and defendant appeals from the judgment.

The fact of plaintiff's permanent disability was sufficiently established by the evidence. He had been employed in different department stores, and in 1930 was a floorman in the Boston store in Chicago; at that time his head began to turn to the left; he took electrical treatments and massage, apparently without benefit; he then went to the Edward Hines hospital, as he was an ex-soldier, where he had treatment, then to the Great Lakes hospital, then back to the Edward Hines hospital. Two doctors testified they had examined plaintiff and that he was suffering from Hypertrophic Arthritis of the entire vertebral column; that this condition was permanent and that plaintiff was totally and permanently disabled and unable to carry on any gainful occupation during the remainder of his life; one of the doctors said his condition would become aggravated as time goes on and that he could not do any office work sitting at a desk. Defendant introduced three witnesses, two of whom testified as experts, giving a somewhat contrary opinion in answer to hypothetical questions; the other, Dr. Soukup, testified on behalf of defendant that he had examined plaintiff and in his opinion he was not permanently disabled. The jury properly could accept the testimony of plaintiff's physicians who examined him, and find that plaintiff wa

totally and permanently disabled.

Defendant argues that this is not sufficient because the company undertakes to make payment upon receipt of "due proof" of total and permanent disability, and that the applications for total and permanent disability benefits sent by plaintiff to defendant did not prove that plaintiff was totally disabled. The applications were enclosed with statements of Mr. Nelson, not a licensed physician, who first gave plaintiff electrical treatments and massage. Mr. Nelson did not answer the questions contained in the statement as to whether plaintiff was totally disabled or was sufficiently recovered to engage in any gainful work. In the statement made by Dr. Moore, accompanying the application, he answered that the plaintiff had recovered sufficiently to engage in gainful work and was not disabled, but this statement also contained the admission that Dr. Moore had never seen the plaintiff and that the information given was taken from the records of the Hines hospital.

The argument of the defendant assumes that plaintiff's application for benefits must contain proofs to the satisfaction of the Insurance company that he was permanently disabled, whereas it is more reasonable to hold that the fact of disability itself is the determining factor rather than the quality of the proof contained in the application. The same argument that is here advanced by defendant was made and considered in Herman v. New York Life Ins. Co., 267 Mich. 426, where the court very aptly said:

"Defendant's principal contention is that 'due proof' of total disability was not submitted to defendant. It is argued that it is not the fact of disability but the showing to the company which brings the clause into operation.

Of course the policy cannot fairly be construed to constitute defendant the sole judge of disability nor to mean that the fact of permanent disability is foreclosed in favor of or against either party by the proof made to the company by the insured. Actionable disability ultimately is a question of fact for trial. 'Due proof' can mean no more than that reasonable evidence of disability within the terms of the policy shall be submitted to the company. Where such evidence is submitted in a good faith attempt to comply with the provisions of the policy the company should point out particularly any defects therein if it intends to rely upon them."

totally and permanently disabled.

Defendant argues that this is not sufficient because the company undertakes to make payments upon receipt of "due proof" of total and permanent disability, and that the qualifications for total and permanent disability merely exist or plaintiff is entitled to be not sure that plaintiff was totally disabled. The qualifications were contained with statements of Dr. Bolson, not a licensed physician, who first gave plaintiff electrical treatments and massage. Dr. Bolson did not answer the questions contained in the statement as to whether plaintiff was totally disabled or was sufficiently improved to return to her physical work. In the statement made by Dr. Stern, accompanying his qualifications, he answered that the plaintiff had received electrical treatments to engage in physical work was not disabled, but this statement also contained the admission that Dr. Stern had never seen the plaintiff and that the information given was taken from the records of the Jewish Hospital.

The argument of the defendant assumes that plaintiff's application for benefits must contain proofs to the satisfaction of the Insurance company that he was permanently disabled, whereas it is more reasonable to infer that the fact of disability itself is the determining factor rather than the quality of the proof contained in the application. The same argument that is here advanced by defendant was made and considered in Jackson v. Am. Ins. Life Ins. Co., 87 Kan. 631, where the court very aptly held:

"Defendant's principal contention is that 'due proof' of total disability was not furnished by plaintiff. It is argued that it is not the fact of disability but the showing to the company which brings the claim into operation.

Of course the policy cannot fairly be construed to constitute defendant the sole judge of disability nor to mean that the fact of permanent disability is proclaimed in fact of an opinion either party or the proof made to the company by the insured. Informable disability without disability is a question of fact for trial. 'Due proof' has been no more than that reasonable evidence of disability within the terms of the policy shall be submitted to the company. Where such evidence is submitted in a good faith attempt to comply with the provisions of the policy the company should point out particularly any defects therein if it intends to rely upon them."

This is a correct statement of the rule to be followed and is a sufficient answer to the contention of defendant. The recent case of Zerger v. Prudential Ins. Co., 289 Ill. App. 444, involved the question of what was due proof of permanent disability. It was there held that the fact was the main thing to be ascertained and that reasonable proof is all that is required to be submitted to the insurance company.

Plaintiff paid certain premiums on the policies which became due subsequent to the time he became totally disabled. Evidence as to these payments was admitted and they were included in the judgment. This was proper. When plaintiff submitted to defendant proof of his disability he inquired of the agent as to what he should do with reference to payments of premium and was told that in order to keep the policies alive he should continue making such payments until the matter of his application for total disability benefits had been settled. The policy waived payment of premiums after proof of disability, and premiums paid after this time should be returned to plaintiff. It was proper to include them in the judgment.

We see no reason to disagree with the verdict, and as there were no errors on the trial the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

This is a correct statement of the rule to be followed and is a sufficient answer to the contention of defendant. The recent case of Jarrett v. Prudential Ins. Co., 98 Ill. App. 444, involved the question of what was the proof of permanent disability. It was there held that the fact was the only thing to be ascertained and that reasonable proof is all that is required to be submitted to the insurance company.

Plaintiff gave certain testimony on the policies which became due subsequent to the time he became totally disabled. Whether or not these payments were identical and they were included in the judgment. This was error. Their principal contention is determined proof of his disability be implied of the agent so that be should be with reference to payments of premium and was said that in order to keep the policies alive he should continue making such payments until the notice of his application for total disability benefits had been settled. The policy varied payment of premium after proof of disability, and premium paid after this time should be returned to plaintiff. It was proper to instruct such in the judgment.

We see no reason to disagree with the verdict, and we therefore affirm the action of the trial the judgment is affirmed.

AFFIRMED.

Matchett and Chamberlin, Pl.'s Attorneys.

38476

A. M. HARRETTICK,
Appellee,

vs.

JAMES J. TOPP and CHRISTINE TOPP,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

283 I.A. 640

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Upon trial by the court of a suit to recover damages for alleged breach by defendants of a written contract for the purchase by them of real estate, plaintiff had a judgment for $11,600, from which defendants appeal.

Plaintiff argues that he complied with all his requirements mentioned in the contract. Defendants deny this and say that plaintiff never tendered a deed to the premises or a guarantee policy of the Chicago Title and Trust Company which, by the contract, plaintiff was required to tender.

The contract was entered into January 5, 1929; by it defendants agreed to pay for the described real estate in Chicago $24,600, and plaintiff agreed to sell the premises at this price and to convey to defendants a good and merchantable title by warranty deed. The agreement stated that plaintiff had an agreement with the administrator of the estate of George Harrettick, deceased, to buy the premises, and that if the administrator for any cause whatsoever did not deliver a deed to plaintiff, or in case a defective title was found, then this contract of sale shall be null and void.

It should be noted here that plaintiff alleged, and it was proven, that on the same day this contract was made he was the successful bidder for the property at a judicial sale held pursuant to the order of the Probate court of Cook county in the estate of George Harrettick, deceased.

A. E. ADAMSTEIN,

Appellee,

vs.

Frank J. TOBY and Elizabeth TOBY,

Appellants.

IN PROBATE DIVISION ADAMSTEIN
DECLARING THE EXECUTION OF THE DEED.

This issue by the court of a suit to recover damages for alleged breach by defendants of a written contract for the purchase by them of real estate, plaintiff had a judgment for $1,000, from which defendants appeal.

Plaintiff argues that he complied with all his requirements contained in the contract. Defendants deny this and say that plaintiff never bondered a deed to the premises or a guarantee policy of the Chicago Title and Trust Company which, by the contract, plaintiff was required to render.

The contract was entered into January 8, 1928; by it defendants agreed to pay for the described real estate in Chicago $18,000, and plaintiff agreed to sell the premises at this price and to convey to defendants a good and merchantable title by warranty deed. The agreement stated that plaintiff had an agreement with the administrator of the widow of Jerome Bartritch, deceased, to buy the premises, and that if the administrator for any cause whatsoever did not deliver a deed to plaintiff, or in case a defective title was found, then the contract of sale should be null and void.

It should be noted here that plaintiff claimed, and it was proven, that on the same day this contract was made he had had successful bidder for the property at a judicial sale had returned to the office of the circuit court of Cook county in the sums of Seven Hundred Dollars.

The contract of sale to defendants also contained a provision that unless plaintiff should tender a deed to the premises, together with a guarantee policy from the Chicago Title and Trust company, "within sixty (60) days," then, at the option of the purchasers the contract shall be null and void; that the purchasers had paid $500 as earnest money, the balance to be paid in cash and by a note secured by mortgage on the premises after the title had been examined and accepted by the purchasers.

It seems to be conceded by plaintiff that he did not and could not have tendered a deed to the premises within 60 days from January 5, 1929, for the reason that the sale to plaintiff by the administrator of the George Marrettick estate was not confirmed until the following November. The proposed sale of the land in the estate in the Probate court to plaintiff was delayed, apparently for the reason that it was necessary to dispose of the rights of certain heirs of George Marrettick, deceased, who resided in Europe.

The contract of sale also contained a provision that "A merchantable title and guarantee policy made by the Chicago Title & Trust Company shall be furnished by the vender within a reasonable time after the said property has been conveyed to him by the said Administrator as aforesaid," and the question arises, What is a "reasonable time" after the property was conveyed from the George Marrettick estate to the plaintiff and the sale confirmed? Construing this provision by the prior provision that plaintiff must tender a deed, together with a guarantee policy within 60 days, we hold that the "reasonable time" in this later provision means also 60 days. To hold otherwise would render nugatory the prior clause of the contract.

The question then arises whether plaintiff furnished or tendered, within 60 days after November 15, 1929, the date of confirming the sale in the Probate court, a guarantee policy. Sixty days from November 15th would be January 13th. Plaintiff under-

The contract of sale in defendants also contained a provision that unless plaintiff should tender a deed to the premises, together with a guarantee policy from the Chicago Title and Trust Company, "within sixty (60) days," then, at the option of the guarantors the contract should be null and void; that the purchaser had paid $500 on account money, the balance to be paid in cash and by a note secured by mortgage on the premises after the title had been examined and accepted by the purchasers.

It seems to be conceded by plaintiff that he did not and could not have tendered a deed to the premises within the sixty days, January 8, 1926, for the reason that the sale to plaintiff by the administrator of the estate of Catherine Kelly was not effected until the following February. The purported sale of the land in the estate to the defendants could be plaintiff's only claim, certainly for the reason that it was necessary to obtain the consent of certain heirs of George Kelly, deceased, who resided in Europe.

The contract of sale also contained a provision that "Title and guarantee policy shall be furnished by the Chicago Title & Trust Company shall be furnished by the vendor within a reasonable time after the said property has been conveyed to him by the said administrator or trustee," and the question arises, what is a "reasonable time" after the property was conveyed to him. Counsel for the defendants argue that the contract was satisfied when the said administrator had conveyed the property to the vendee, and that the sixty days, so that the "reasonable time" in this later provision began also on that date. To this otherwise small matter the trial court gave no heed.

The plaintiff then asked specific performance of the contract, which was denied by the court, and the bill dismissed. Finding the sale in the Probate court, a guarantee policy, sixty days from December 14th would be "reasonable time" for plaintiff to

took to show that there was a conversation with defendants sometime in December, 1929, in which defendants stated they would not go through with the deal. The testimony produced by plaintiff as to the time is very uncertain. He thought it was around in December, 1929. Plaintiff's brother-in-law testified the conversation was either in December, 1929, or January, 1930. Defendant James Topp testified that the conversation was in December or January, but he "was not sure." Plaintiff testified that the day after this conversation took place he called upon the attorney for defendants, but subsequently stated that he was sure he talked with the attorney for defendants before he had the conversation with defendant James Topp in which this defendant stated he would not go through with the deal. The definite date as to when the conversation with defendants' attorney occurred is furnished by Maurice Berasek, member of the firm of Sonnenschein, Berkson, Lautmann, Levinson & Morse. He testified he had known defendant Mrs. Topp for many years; that he remembered the conversation with plaintiff and that from a memorandum made on office service sheets which refreshed his recollection he testified that the date of the conversation was March 10, 1930. It follows, therefore, that the alleged tender by plaintiff and the alleged refusal by defendants to perform occurred sometime around March 10, 1930, and after the expiration of the time limit, which we hold was January 15, 1930.

Plaintiff alleged in his declaration that he presented to defendants a guarantee policy of the Chicago Title and Trust Company showing title in plaintiff free and clear of all encumbrances and obligations, and also offered to deliver a warranty deed, and that despite such tender of performance on the part of plaintiff of his obligations under the agreement, defendants failed and refused to perform their obligations. The case was tried upon the theory that plaintiff made the tenders alleged. It was shown

took to show that there was a conversation with defendants sometime in December, 1939, in which defendants stated they would not go through with the deal. The testimony produced by plaintiff as to the time is very uncertain. It appears it was around in December, 1939. Plaintiff's daughter-in-law testified the conversation was either in December, 1939, or January, 1940. Defendant James Tapp testified that the conversation was in December or January, but he was not sure. Plaintiff testified that the day after this conversation took place he talked upon the attorney for defendants, but subsequently stated that he was sure he talked with the attorney for defendants before he had his conversation with defendant James Tapp in which his defendant stated he could not go through with the deal. The testimony relative to when the conversation with defendants' attorney occurred is furnished by Louis Tapping, member of the firm of Tapping, Tapping, Tapping, Tapping & Bates. He testified he had been defendants' attorney for many years, that he remembered the conversation with plaintiff and that from a memorandum made on office records which refreshed his recollection he testified that the date of the conversation was March 12, 1940. It follows, therefore, that the alleged tender by plaintiff and the alleged refusal by defendants to perform occurred sometime around March 12, 1940, and after the expiration of the time limit, which we hold was January 31, 1940.

Plaintiff alleges in his declaration that he executed to defendants a warranty policy of the Chicago Title and Trust Company showing title in plaintiff free and clear of all encumbrances and obligations, and also offered to deliver a warranty deed, and that despite such tender of performance on the part of plaintiff of his obligations under the agreement, defendants failed and refused to perform their obligations. The case was tried upon the theory that plaintiff made the tender alleged. In the first

beyond dispute that plaintiff did not make the tenders alleged. An assistant secretary of the Chicago Title and Trust Company testified that his company had not issued a guarantee policy on this property; that on November 15, 1929, an application was made for letters of opinion or guarantee policies on the property, and that three letters of opinion were issued pursuant to this application, the last of these on December 30, 1929. The fact that three letters of opinion were issued suggests that objections to the title appeared which plaintiff was endeavoring to clear up. As the letter of opinion of title of the Chicago Title and Trust Company was not introduced in evidence there is a failure to prove the state of the title and whether there were objections or encumbrances. Plaintiff admitted that he never had a guarantee policy.

Moreover, there is no evidence that plaintiff tendered a warranty deed conveying a good title, and the record fails to show that all of the parties in interest were ready and willing to make conveyance to defendants. Title to the property was in Abraham Marrettick and Pearl Marrettick, his wife, as joint tenants in an undivided half, and William Arthur Mendelson and Hattie Ruth Mendelson, his wife, as joint tenants in an undivided half. Pearl Marrettick, the joint owner of an undivided half of the property, was not called as a witness, nor was there any testimony offered that she had ever signed a deed or authorized a conveyance of her interest in the property to defendants. There was also on record a trust deed from William Mendelson, conveying the premises to the Chicago Title and Trust Company, which mortgage plaintiff testified he owned.

Mr. Berkson gave the most definite testimony as to what was said in his conversation with plaintiff on March 10, 1930. That he inquired of plaintiff when the contract of purchase was made and told plaintiff that so much time had elapsed in securing title and

times had so changed that there would be no point in defendants buying the property, except to erect a warehouse thereon, and that because of the changed times he doubted if the defendants could finance the construction of a warehouse; that in his opinion no construction loans could be secured; that plaintiff said he was sure he could assist the financing of a building by finding a loan for defendants. This conversation indicates that plaintiff had abandoned any hope of enforcing the contract of purchase and was negotiating for a new contract in which he would secure a loan to enable defendants to buy the property.

Plaintiff replies in his brief that where one party refuses to perform, the other party is excused from offering to perform, citing many cases supporting this as a general proposition. The evidence shows there was no refusal by defendants to perform until after an unconscionable length of time had elapsed after making the contract. In the ordinary course of events the contract should have been consummated within 60 days after its execution. The delay was caused by the time required to dispose of the interests of the parties in the estate residing abroad. These were not cleared up until over ten months had gone by. We hold that this was an unreasonable delay which relieved defendants of their obligations under the contract. Thomas v. Beaman, 275 Ill. 267, involved a suit by a purchaser under a land contract to recover the amount paid; he was entitled to receive an abstract of title and a deed when his second payment was made; these were not tendered until a long time thereafter; he refused to accept them; during all this time the purchaser was in possession of the property. The court held he was entitled to recover, saying such contracts "ought not to be so construed as to allow the other party an unreasonable length of time to perform that part of the contract he had contracted to perform in

case of a breach by him. In Harding v. Olson, 177 Ill. 298, we held that a delay of four months in delivering the deed pursuant to the contract was an unreasonable delay. We think the rule announced and applied there controls this case." In the instant case the contract cannot be construed so as to hold defendants for an indefinite time, and they were justified, after the lapse of over a year after the contract was made, in refusing to consummate the deal.

The court entered its finding for the plaintiff January 14, 1935; January 22nd plaintiff asked leave to file an amendment, which alleged that on December 4, 1929, he offered to perform all the things required to be performed by him in the contract and that defendants instructed him they would not perform the things required by them to be done, thereby excusing plaintiff from performance. The motion for leave to file this amendment to plaintiff's declaration was continued, and the record shows no order was ever obtained granting leave to file this amendment. This left the declaration as originally set forth, claiming performance by plaintiff. Even should the amendment be considered as alleging an excuse for non-performance by the plaintiff, the evidence failed to support its averments.

Plaintiff argues that the agreement of plaintiff to furnish a warranty deed and a guarantee policy was to be performed concurrently with the payment of the purchase price by defendants, and that under such circumstances all plaintiff must prove is that he was ready and willing to perform on his part provided the defendants were at the same time ready to perform. The provisions of the contract do not support this assertion. It provides that the purchasers have paid $500 as earnest money to be applied on the purchase,

> "when consummated, to be paid within five days after the title has been examined and found good and accepted by them, the further sum of $7,500 *** provided a good and statutory general warranty deed conveying to the said purchasers a good and mer-

case of a breach by him. In Kerslake v. Adams, 171 Ill. 328, we said that a delay of four months in delivering the land purchased is the contract was an unreasonable delay. It rules the rule announced and applied there controls this case." In the instant case the courtesy cannot be construed so as to hold defendants for an indefinite time, and they were justified, after the lapse of over a year after the contract was made, in refusing to consummate the deal.

The court entered its finding for the plaintiff January 14, 1938; January 22nd plaintiff asked leave to file an amendment, which alleged that on December 4, 1937, he offered to perform all the things required to be performed by him in the contract and that defendants instructed him they would not perform the things required by them in the contract, thereby anticipatory plaintiff's performance. The motion for leave to file the amendment to plaintiff's declaration was continued, and the record shows no order was ever obtained granting leave to file this amendment. This left the declaration as originally set forth, stating performance by plaintiff. Even should the amendment be considered as alleging an excuse for non-performance by the plaintiff, the evidence fails to support its averments.

Plaintiff argues that the agreement of plaintiff to furnish a warranty deed and a guarantee policy was to be performed concurrently with the payment of the purchase price by defendants, and that under such circumstances all plaintiff must prove is that he was ready and willing to perform on his part provided the defendants were at the same time ready to perform. The provisions of the contract do not support this assertion. It provides that the purchase price paid $300 on earnest money to be applied on the purchase, warranty deed conveying to the said purchasers a good and merchantable title to be paid within five days after the title has been examined and found good and accepted by them, the further sum of $7,800 was provided a good and statutory general warranty deed conveying to the said purchasers a good and merchantable title to be paid within five days after the title has been examined and found good and accepted by them, the

> chantable title to the said premises, subject as aforesaid, shall then be ready for delivery.
>
> In case material defect be found of said title and so reported, then if said defect be not cured within 60 days after notice thereof, this contract at the option of the purchaser shall become null and void and the earnest money shall be returned."

This clearly means that after plaintiff submitted evidences of good title the defendants should have five days to examine the title and, if found good, to accept it. There were no obligations upon defendants concurrent with the obligation of plaintiff to present a good title.

Plaintiff claimed rental for use and occupation. The property was vacant except for an old coal shed. The broker who negotiated the deal told Topp that he might use this if he could, and defendant put a desk and an extension telephone in the shed and two signs advertising his business of storage warehouse and moving, but did not use the premises after the fall of 1939. It should be remembered that at this time plaintiff did not own the property; he had only bid for the same and was awaiting the action of the Probate court with reference to his bid.

The only evidence touching the question of the rental value for use and occupation of the property was by a real estate dealer, who testified that considering the use of the property made by the defendant he had no idea what it was worth for such use.

There is force in the suggestion of counsel for the defendants that under the contract of January 5, 1939, defendants could never compel plaintiff to acquire title to the property, and that if, "for any cause whatsoever," plaintiff failed to obtain a deed from the administrator - including his own voluntary abandonment of the transaction - he was absolved from all obligation or liability under the contract, and that under such circumstances plaintiff should be held to a strict degree of performance.

For the reasons above indicated we are of the opinion that

opportunity title in the mid 1950's, motions as aforesaid, shall then be ready for delivery.

In some modern defeat be found of such title and in period, then it said defeat be for never within do days after notice thereof, this contract as the option of the purchaser shall become null and void and the earnest money shall be returned."

This already seems that after diligently examining evidence of good title the defendants would have five days to examine the title and, if found wanting, to assert it. There was no obligation upon defendants immediately with the obligation of plaintiff to present a good title.

Plaintiff obtained permit for use and occupation. The property was vacant except for an old cook shed. The owner was negotiating the deal said they then be right was this to be would, and defendant put a lock and an extension telephone in the shed and the place was visiting his business of storage warehouse and moving, but its not the business after the 1st of 1949. It should be remembered that at this time plaintiff did not own the property; he had only bid for the same and was awaiting the action of the Probate court with reference to his bid.

The only evidence showing the execution of the rental value for use and occupation of the property was by a real estate broker, who testified that immediately the use of the property made by the defendant he had no idea that it was worth far much more.

There is fixed in the agreement of counsel for the defendants that under the contract of January 2, 1950, defendants could never compel plaintiff to accept title to the property, and that if, "for any cause whatsoever," plaintiff failed to procure a good title from the administrator - including his voluntary abandonment of the transaction - he was released from all obligation on liability under the contract, and that under such circumstances plaintiff could in fact be a stakeholder of instruments.

For the reasons above indicated we are of the opinion that

the court should have found the issues for the defendants and should have ordered the suit dismissed. As the case was tried by the court without a jury we will therefore reverse the judgment without remanding the cause.

REVERSED.

Matchett and O'Connor, JJ., concur.

33490

CHICAGO TITLE & TRUST COMPANY, a Corporation, as Successor-Trustee,
Appellee,

vs.

STEPHEN J. WALL et al.,
Defendants.

On Appeal of GERTRUDE FAEGENSON, (Intervening Petitioner)
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

283 I.A. 641

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Gertrude Faegenson filed a petition in the above entitled cause, a foreclosure proceeding; she alleged that she was a holder of a $1000 bond out of a total issue of $140,000; she attacked various proceedings in the foreclosure and asked that the court name a successor-trustee to take immediate charge of the premises as receiver and that there be a resale of the premises. Plaintiff, Chicago Title & Trust Company, filed an answer. The record shows that on July 3, 1935, all the parties being in court, the petition was heard and denied; on the same date an order was entered confirming the master's report of sale and distribution. Apparently plaintiff appeals from the order denying the prayer of the petition and from the order confirming the master's report of sale.

The points made in the brief by the petitioner all relate to the proceedings which took place before the chancellor on the hearing of her petition. On motion of plaintiff this court on December 27th, last, struck the report of the proceedings from the record filed in this court for the reason that there was no proper certificate of the trial Judge. Judge Lewis, who heard the petition, died before signing the report of proceedings; the report was presented to Charles A. Williams, one of the Judges of the Superior court; objections were filed challenging its correctness; Judge Williams

certified that he had no personal knowledge of the proceedings and could not certify to the correctness of the report. We properly sustained the motion to strike.

We suggest that under such circumstances, where the parties cannot agree upon the report of the proceedings, the party wishing to have them reviewed should apply to the trial court for a rehearing so that the evidence may be heard and the matter considered by another judge, who will thereby become qualified to certify to the correctness of the report of proceedings.

As all the errors assigned relate to matters occurring upon the hearing, the orders appealed from must be affirmed. Hampshire Drain. Dist. v. Honeywell, 289 Ill. 145, and many other cases.

After this cause was considered and decided by this court the intervening petitioner asked leave to file a reply brief instanter, which motion has been allowed. In the reply brief the amount of the foreclosure sale is questioned. No such point or argument was made in the original brief, and rule seven of this court provides that reply briefs should not raise any new points but should be confined strictly to the points presented by the brief of the opposing party. Rule 39 of the Supreme court is to the same effect, and in many decided cases it has been held that new points made for the first time in the reply brief will not be considered. Cheney v. Cross, 181 Ill. 51; Ryerson & Son v. Peden, 222 Ill. App. 150; McFadden v. Saint Paul Coal Co., 193 Ill. App. 36. We are therefore not called upon to consider the point made in the reply brief.

For the reason above indicated the orders appealed from are affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

38561

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH HAMILTON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

283 I.A. 641

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty of contributing to the delinquency of a child and was sentenced to the House of Correction in the city of Chicago for the term of six months. He asks for a reversal. The evidence has not been preserved, and the errors, if any, are presented on the common law record.

It is first said that the information is fatally defective. The offense charged was the violation of par. 100 of the Criminal Code, chap. 38, Ill. State Bar Stats. 1935, which provides that any person who shall knowingly or wilfully cause or encourage any female under the age of eighteen years to become a delinquent child, or knowingly or wilfully do acts which directly tend to render any such child delinquent, shall on conviction be punished by fine or imprisonment. The present information charged that the defendant on July 1, 1935, at the city of Chicago,

"did unlawfully, knowingly and wilfully encourage Audrey and Shirley Ulrich, a female person under the age of 18 years to-wit: 9 years and 5 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Audrey and Shirley Ulrich to be or to become a delinquent child in that he, the said Joseph Hamilton did take indecent liberties with the said Audrey and Shirley Ulrich in his candy store located at 3504 Wabansia and cause the said Audrey and Shirley Ulrich to commit indecent and lascivious acts, contrary to the form of the Statute..."

Defendant says that the information is fatally defective in failing to set out the particular specific acts done which tended to render the child to become delinquent. It is not necessary in such cases to set out in detail the particular specific acts.

THE STATE OF NEW YORK, by [illegible],
Defendant in Error,

vs.

PETER LAUTZER,
Plaintiff in Error.

Error to Criminal Court of Cook County.

MR. PRESIDING JUSTICE MORAN
DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty of contributing to the delinquency of a child and was sentenced to the House of Correction in the city of Chicago for the term of six months. He sues for a reversal. The evidence has not been preserved, and the errors, if any, are presented on the common law record.

It is first said that the information is fatally defective. The errors charged are the violations of par. 1a of the criminal Code, ch. 38, Ill. State Bar Stats. 1937, which provides that any person who shall knowingly or willfully cause or encourage any child under the age of eighteen years to become a delinquent child, or knowingly or willfully do acts which directly tend to render any such child delinquent, shall on conviction be punished by fine or imprisonment. The charge information charges that the defendant on July 1, 1937, at the city of Chicago,

"did willfully, knowingly and wrongfully encourage, cause and contribute to the delinquency of Shirley Ulrich, a female person under the age of 18 years to-wit: 9 years and 8 years of age, so as to become a delinquent child and did then and there unlawfully, knowingly and willfully do acts which directly tend to render said Shirley Ulrich a delinquent child, promoted and contributed to the conditions which tended to render said Shirley Ulrich delinquent, in that he, the said defendant did have intercourse with the said Shirley and Shirley Ulrich in his car, which were located in the city of Chicago, County of Cook and State of Illinois, contrary to the form of the statute..."

Defendant says that the information is fatally defective in failing to set out the particular obscene acts and words tended to render the child to become delinquent. It is not necessary in such cases to set out in detail the particular specific acts.

The information is sufficient which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood. People v. Scatturn, 238 Ill. 313; Strohm v. People, 160 Ill. 582; Lochr v. People, 132 Ill. 604; Seacord v. People, 121 Ill. 623; Fuller v. People, 92 Ill. 182; People v. Wallace, 188 Ill. App. 213. The information was substantially in the language of the statute and entirely sufficient to notify the defendant of the nature of the offense with which he was charged.

The point is next made that the information is insufficient to show the venue, as there is no statement that the store at 3504 Wabansia is in the city of Chicago. The information charges that the acts complained of took place in the city of Chicago.

It is said that the judgment is void for uncertainty. The court found the defendant guilty in manner and form as charged in the information and adjudged him guilty of the criminal offense of contributing to the delinquency of a child. It is sufficient where an information charges the commission of a crime, for the judgment to find the defendant guilty in manner and form as charged in the information. People v. Conboy, 178 Ill. App. 90.

The information charged defendant with contributing to the delinquency of Audrey and Shirley Ulrich, two female persons, while the defendant was adjudged guilty of "contributing to delinquency of child" on the finding of guilt. We do not think the point is important. If the meaning of a judgment is plain when read in connection with other parts of the record it is sufficient. The information charged defendant with taking indecent liberties with both the little girls. In the absence of a bill of exceptions we will presume that the finding that defendant was guilty as charged in the information was supported by the evidence, and the judgment

The information is sufficient which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood. People v. Sanders, 238 Ill. 414; Brown v. People, 140 Ill. 497; Loehr v. People, 132 Ill. 544; Hayward v. People, 141 Ill. 604; Miller v. People, 97 Ill. 62; People v. Talliere, 126 Ill. App. 218. The information was substantially in the language of the statute and entirely sufficient to notify the defendant of the nature of the offense with which he was charged.

The point is next made that the information is insufficient in that the venue, so there is no statement that the store at 3944 Wabansia is in the city of Chicago. The information averres that the sole complained of took place in the city of Chicago.

It is said that the judgment is void for uncertainty. The court found the defendant guilty in manner and form as charged in the information and adjudged him guilty of the criminal offense of contributing to the delinquency of a child. It is sufficient where an information averres the commission of a crime, for the judgment to find the defendant guilty in manner and form as charged in the information. People v. Conley, 178 Ill. App. 90.

The information charged defendant with contributing to the delinquency of Harry and Harvey Little, two female persons, while the defendant was adjudged guilty of "contributing to delinquency of child" on the finding of guilt. We do not think the point is important. If the meaning of a judgment is plain and in connection with other parts of the record it is sufficient. The information charged defendant with being delinquent females with both the little girls. In the absence of a bill of exceptions we will presume that the trialing that defendant was guilty as charged in the information was supported by the evidence, and the judgment

that defendant was guilty of contributing "to delinquency of child" on the finding of guilty, means that defendant was guilty with reference to both children. It is well settled that all parts of the record are to be interpreted together, effect being given to all if possible, and a deficiency at one place may be supplied by what appears at another. People v. Murphy, 138 Ill. 144.

We see no convincing reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

that determine the policy of distribution "in relationship of duties" as the claims of justice, since her decisions are policy when referred to such criterion. It is well written and such as the reader can to be interesting reading, other than in all if possible, and a definition of the place may be supplied by that account of matter. Pound v. Deering, 146 Ill. 544.

We can do nothing more in drawing the judgment, and it is affirmed.

AFFIRMED.

Gaskill and O'Connor, JJ., concur.

39517

JEROME M. DEUTSCH,
Plaintiff in Error,

vs.

RELIANCE LIFE INSURANCE COMPANY,
a Corporation,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

283 I.A. 641

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On December 26, 1929, defendant insurance company of Pittsburgh, Pennsylvania, issued to plaintiff a health insurance policy, which by its terms expired March 26, 1930. The policy was renewed for a term ending June 26, 1930. By its terms defendant agreed to indemnify plaintiff against loss resulting directly or independently of any and all other causes from sickness or disease contracted while the policy was in force. Section 1 of the policy provided in substance that if such sickness should totally disable and render the insured continuously unable to transact any and every part of his business duties and should necessitate regular treatment by a legally qualified physician, the company would pay for the period of total disability and treatment (not to exceed 52 consecutive weeks) an indemnity per week of $50, and that if, following a period of total loss of time, such sickness should partially disable and prevent the insured from performing a material part of his important daily duties and necessitate regular treatment by a legally qualified physician, the company would pay for the period of such partial disability and treatment (not to exceed eight consecutive weeks) an indemnity per week of one-fourth of the weekly indemnity specified for total loss of time; that payment should not be made for more than 52 weeks total and partial disability combined. The policy also provided:

"This policy does not extend to nor cover any loss caused by any sickness or disease existing or contracted prior to the

[illegible]

[illegible]

[illegible]

issue of this policy, nor lessened by any sickness or disease unless disability resulting therefrom begins while this policy is in force."

Other provisions of the policy were that written notice of claim must be given within ten days after the commencement of disability, but that failure to give notice within the time provided in the policy should not invalidate any claim if proof was made that it was not reasonably possible to give it, and that notice was in fact thereafter given as soon as reasonably possible; that affirmative proof of loss must be furnished the company within 90 days after the termination of the period of disability, and that upon request of the insured and subject to due proof of loss, the accrued indemnity for loss of time on account of disability would be paid "at the expiration of each 60 days" during the continuance of the period for which the company was liable, and the balance remaining unpaid at the termination of the period would be paid immediately "upon receipt of due proof."

In the month of January, 1930, plaintiff submitted to defendant a claim on account of gripe and sore throat, which was allowed and paid to the amount of $50. In February, 1930, plaintiff went to the hospital, where his tonsils were removed. The operation was followed by hoarseness. On June 18, 1930, plaintiff gave defendant a written notice that he became ill as of June 14th with a "bad cold and inflamed vocal cords"; that he was being treated by Dr. A. Greenberg; that if paid at once he would accept $50 in full settlement; and requested that blanks for proof be sent to him at the Blackstone hotel in Omaha, Nebraska, whence the notice to defendant was sent. On July 5, 1930, he presented to defendant proof of loss and disability, stating that he had contracted the disease on June 14, 1930, the nature of which was that the roof of his mouth was "blistered and sore -- voice gone -- pains in throat"; that he was wholly disabled for three weeks, and claimed indemnity to the amount

Issue of the policy, not necessarily to any claimant or claims policy is motivated, consider claims which are policy in force.

Other provisions of the policy were that written notice of claim must be given within ten days after the commencement of disability, but that failure to give notice within the time provided in the policy should not invalidate any claim if proof was made that it was not reasonably possible to give it, and that notice was in fact thereafter given as soon as reasonably possible; that written proof of loss must be furnished the company within ninety days after the termination of the period of disability, and that upon receipt of the insured and subject to the proof of loss, the company immediately for loss of time on account of disability would be made "at the rate of each 24 hours" during the continuance of the period for which the company was liable, and the balance remaining unpaid at the termination of the period would be paid immediately "upon receipt of due proof."

In the month of January, 1930, plaintiff submitted a claim on account of injuries and sore throat, which was claimed and paid in the amount of $90. In February, 1930, plaintiff was in the hospital, where six tonsils were removed. The operation was followed by hemorrhage. On June 19, 1930, plaintiff gave defendant a written notice that he became ill on of June 14th with a "bad cold and inflamed vocal cords"; that he was being treated by Dr. A. Brandon; that if paid at once he could escape the 14 days excluded; and requested that blanks for proof be sent to him at the Dimmitsburg hotel in Omaha, Nebraska, where the notice is returned was sent. On July 7, 1930, he presented to defendants proof of loss and disability, stating that he had contracted the disease on June 14, 1930, the nature of which was that one vocal of his mouth was "ulcerated and sore -- vocal cord -- pains in throat"; that he was wholly disabled for three weeks, and claimed indemnity to the amount

of $150 for that time; that he was also partially disabled for two weeks from July 7, 1930, to and including July 21st, for which he claimed indemnity to the amount of $25. The claim stated that he would accept $175 in full settlement. On July 14th defendant settled the claim by paying plaintiff $175, and plaintiff delivered to defendant a release and discharge "from any and all claims I now have against it by reason of any disease incurred by me prior to this date, and hereby guarantee it against any further liability in consequence thereof." The claim submitted at this time was signed by Dr. Greenberg as plaintiff's attending physician. The evidence also tends to show that Dr. Greenberg treated plaintiff in August and December, 1930, and was paid by plaintiff for his services. Dr. Greenberg was also at this time on the payroll of defendant corporation as one of its physicians. In January, 1931, plaintiff applied to defendant for a life insurance policy. Dr. Greenberg acted as medical examiner, and such policy was issued to plaintiff for the amount of $2,000 on January 21, 1931. The policy contained a waiver of premiums in case of proof of total disability. The uncontradicted evidence shows that from August, 1930, to February 25, 1931, plaintiff went to his office and attended to his usual business, for which he received $100 a week.

August 20, 1931, plaintiff wrote defendant making claim, which he describes as being "under a former health policy." Defendant replied to this letter August 22nd, stating in substance that the policy under which plaintiff claimed was declined for renewal June 26, 1930; that plaintiff's physician when the former payment was made stated that plaintiff's physical condition was good, and thatdefendant could not recognize the claim since the disability of plaintiff began several months after the policy ceased to be in force. The letter also stated that plaintiff had been recommended for total and permanent disability benefits under the life insurance

of $100 for that year; that he was under periodic disabilities for the weeks from July 7, 1930, to not including July 22nd, for which he claimed indemnity in the amount of $75. The claim stated that he would accept $175 in full settlement. On July 14th defendants rejected the claim by paying plaintiff $75, and plaintiff interposed a defendant a release and discharge "from any and all claims I now have against it by reason of my illness incurred by me prior to this date, and hereby guarantee it against any future liability in connection therewith." The claim submitted at this time was signed by Dr. Greenberg as plaintiff's attending physician. The evidence also tends to show that Dr. Greenberg informed plaintiff in August and December, 1930, not was paid by plaintiff for his services. Dr. Greenberg was also at this time on the payroll of defendant corporation as one of its physicians. In January, 1931, plaintiff applied to defendant for a life insurance policy. Dr. Greenberg acted as medical examiner, and such policy was issued to plaintiff for the amount of $2,000 on January 22, 1931. The policy contained a waiver of premiums in case of proof of total disability. The uncontradicted evidence shows that from August, 1930, to February 28, 1931, plaintiff went to his office and attended to his usual business, for which he received $100 a week.

August 30, 1931, plaintiff wrote defendant making claim, which he describes as being "under a waiver double policy." Defendant replied to this letter August 22nd, stating in substance that the policy under which plaintiff claimed was declared for terminated June 22, 1930; that plaintiff's physician when he issued waiver was made aware that plaintiff's physical condition was good, and that defendant could not reopening the claim since the liability of plaintiff began several months after the policy ceased to be in force. The letter also stated that plaintiff had been recommended for total and permanent disability under the life insurance

policy.

October 30, 1931, plaintiff filed this suit in assumpsit based upon the health insurance policy and afterward filed an amended declaration, in which he averred his total and partial disability in June, 1930, the payment by defendant for same, and also averred that he again became totally disabled on February 25, 1931; that he gave written notice of loss to defendant with respect to this total disability on April 20, 1931, and filed proofs of total disability on August 10, 1931. The amended declaration also averred that plaintiff performed every act required of him by and under the terms of the provisions of the policy, and that he claimed $50 a week for 52 weeks of total disability commencing February 25, 1931.

At the close of the evidence plaintiff, over defendant's objection, filed a further amendment to his declaration, in which the period of time for which he claimed indemnity was changed from 52 weeks, commencing February 25, 1931, to a period of 52 weeks commencing August 25, 1930.

Defendant filed a plea of the general issue and pleas which denied that plaintiff had given defendant notice as required by the terms of the policy, and further that plaintiff had not filed proof of loss with respect to the claim involved, as required by the policy. Defendant also set up as a bar the release which had been delivered to it by plaintiff. Defendant also pleaded that the health policy was obtained by plaintiff through fraud. Plaintiff replied, denying fraud in this respect and setting up that the release delivered to defendant was in fact obtained by defendant through fraud.

At the close of all the evidence defendant made a motion for a directed verdict, which was denied. The issues were submitted to a jury, which returned a verdict in favor of defendant, upon which the court, overruling plaintiff's motion for a new trial, entered judgment from which plaintiff has appealed to this court.

policy.

October 30, 1931, plaintiff filed this suit in accordance with the terms of the insurance policy and alleged that on a certain date, in which he secured life or accidental death, in which he secured life insurance, and also received the June, 1930, his payment by defendant for same, and also received the be made known totally disabled on February 28, 1931; that he gave written notice of loss to defendant and requested he pay disability on April 30, 1931, and filed proofs of total disability on August 10, 1931. The amended declaration also averred that plaintiff performed every condition of his by and during the term of the policy, and that he claimed $50 a week for 52 weeks of total disability commencing February 28, 1931.

At the close of the evidence plaintiff, over defendant's objection, filed a further memorandum in his declaration, in which the period of time for which he claimed indemnity was changed from 52 weeks, commencing February 28, 1931, to a period of 52 weeks commencing August 28, 1931.

Defendant filed a plea of the general issue and plaea which admitted that plaintiff had given defendant notice as required by the terms of the policy, and further that plaintiff had not filed proof of loss with respect to the whole interval, as required by the policy. Defendant also set up as a bar the primary which had been initiated to it by plaintiff. Defendant also pleaded that the "Health policy" was obtained by plaintiff through fraud. Plaintiff replied, pleading fraud in this respect and averring on that the reasons furnished to defendant was in fact obtained by defendant through fraud.

At the close of all the evidence defendant moved - pending the a directed verdict, which was denied. The issue then resulted in a jury, which returned a verdict in favor of defendant, upon which the court, overruling plaintiff's motion for a new trial, entered judgment for which plaintiff has assigned in this court.

Plaintiff contends, in the first place, that the judgment should be reversed on account of the ruling of the trial court excluding evidence of a telephone conversation between plaintiff and an unidentified person in the Omaha office of the defendant company in May, 1930. Plaintiff offered to show that he called that office on the telephone and was answered by someone, and that he asked this person whether he was connected with the Reliance Life Insurance Co., and receiving an affirmative answer, said to this unidentified person (an office girl) that he, plaintiff, was a policy holder in the Reliance Co., was sick, would probably have to file a claim under his policy, and asked if "they" would furnish him with the name of one of their examining physicians so that he could go to see him; that thereupon the unidentified person gave him the names of Dr. Abraham Greenberg and two others who were also examining physicians for the Reliance Life Insurance Co., and told him to go to any one of them. He also offered to testify that after he met Dr. Greenberg he told him of this conversation with the "girl in the Omaha office" who had told him to see the Doctor for examination with reference to a possible claim, and that Dr. Greenberg told him that he was an examining physician for the Reliance Insurance company.

Plaintiff contends that the question of whether Dr. Greenberg was an agent of defendant was a question for the jury, and that this evidence was admissible for the purpose of proving such agency. Plaintiff relies on Godair v. Hamilton Nat'l Bank, 285 Ill. 372; Cohen v. A. T. & S. F. Ry. Co., 198 Ill. App. 174, and other cases, which hold, in substance, that when a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel, and that such conversations are admissible in evidence as personal interviews. The cases cited so hold, and the general

Plaintiff contends, in the first place, that the judgment should be reversed on account of the ruling of the trial court excluding evidence of a telephone conversation between plaintiff and an unidentified person in the insurance office of the defendant company in May, 1920. Plaintiff offered to prove that he called that office on the telephone and was answered by someone, and that he asked this person whether he was connected with the Reliance Life Insurance Co., and receiving an affirmative answer, said to this unidentified person (an office girl) that he, plaintiff, was a policy holder in the Reliance Co., and also, would probably have to file a claim under his policy, and asked if "they" would furnish him with the name of one of their examining physicians so that he could go to see him; that thereupon the unidentified person gave him the name of Dr. Abraham Greenberg and two others who were also examining physicians for the Reliance Life Insurance Co., and told him to go to any one of them. He also offered to testify that after he met Dr. Greenberg he told him of this conversation with the "girl in the Omaha office" who had told him to see the Doctor for examination with reference to a possible claim, and that Dr. Greenberg told him that he was an examining physician for the Reliance Insurance company.

Plaintiff contends that the question of whether Dr. Greenberg was an agent of defendant was a question for the jury, and that this evidence was admissible for the purpose of proving such agency. Plaintiff relies on Miller v. Insurance Co., 111 Ill. 470; Eaton v. R. R. Co., 59 N. Y. 78, 82, and other cases, which hold, in substance, that when a person places himself in communication with a insurance system through an instrument in his office, he thereby invites communication in relation to his business through that channel, and that such conversations are admissible in evidence as personal interviews. The cases cited do hold, and the general

rule in that respect is not questioned; but that is not the precise point for decision here. The evidence here was offered for the purpose of establishing agency of Dr. Greenberg for the defendant Insurance company. That he was a medical examiner for defendant is established by other uncontradicted evidence. That was not an issue in the case. Evidence of a conversation with an unidentified office girl, either by telephone or otherwise, would not be admissible as as tending to establish the extent of the agency. City of Chicago v. Noir, 343 Ill. 594. It is not a question of whether the conversation by telephone was admissible, but whether, irrespective of the method of communication, the conversation was admissible at all. We hold that assuming the evidence should have been admitted, its exclusion was harmless.

Plaintiff contends that the release upon which defendant relied was voidable because given by him in reliance upon false and fraudulent representations of the probability of recovery made to him by Dr. Greenberg, who was his attending physician although in the employ of defendant. He cites Simpson v. Omaha & C. B. St. R. Co., 107 Neb. 779, 186 N. W. 1001, and Blaha v. C. B. R. R. Co., 119 Neb. 611, 230 N. W. 453. Here, again, it is not necessary to question the law as stated, since the issue of fact as to fraudulent representations was submitted to the jury and the verdict was for defendant.

Plaintiff also argues that the release as against this suit is inoperative as being given without consideration, since there was no dispute between the parties at the time the release was given as to the liability of defendant or amount to be paid. It is urged, therefore, that the payment was only pro tanto and the discharge not operative as to other subsequent claims. Plaintiff cites Moore vs. Maryland Casualty Co., 150 N. C. 153, 63 S. E. 675; Schilling v. Travelers, 60 Utah 341, 208 Pac. 496; 23 R. C. L. 402.

rule in that respect is not qualified; but that is not the precise point for decision here. The evidence here was offered for the purpose of establishing agency of Dr. Greenberg for the defendant Insurance Company. That is a material question for determination established by other substantial evidence. That was not at issue in the case. Evidence of a conversation with an unidentified office girl, either by telephone or otherwise, would not be admissible as bearing on establishing the ground of the agency. Cf. [illegible] v. Hoit, 248 Ill. 384. It is not a question of whether the conversation by telephone was admissible, but whether, irrespective of the method of communication, the conversation was admissible at all. We hold that assuming the relevant issue was then material, the evidence was incompetent.

Plaintiff contends that the reliance upon which Schubert was alleged was reliance upon the representations of the defendant Travelers Insurance Company. The reliance upon Dr. Greenberg rests upon the representations of the probability of coverage made to him by Dr. Greenberg, who was his attending physician although in the employ of defendant. He cites Hickman v. Jones, [illegible] Ill. App., 107 Ill. App. 1, 10 N. E. 1101, and Fiske v. [illegible], 210 Mass. 221, 96 N. E. 681. Here, again, it is not necessary to question the law as stated, since the issue of fact as to Travelers' representations was submitted to the jury and the verdict was for defendant.

Plaintiff also argues that the refusal to submit this case in improper to a jury given without consideration, since there was no direct evidence for parties as to that the recovery was given as to the liability of defendant or amount to be paid. It is urged, therefore, that the judgment was only [illegible] and the discharge not operative as to other defendant claims. Plaintiff cites Bunge v. Maryland Casualty Co., 181 N. Y. S. 139, 44 N. Y. 471; Hamilton v. Travelers, 6 Wash. 641, 208 Pac. 1095; 22 R. C. L. 402.

The policy was to expire in a few days, and payment was made in advance for partial disability from which plaintiff had not fully recovered. It is fair to presume that it was the intention of the parties under the circumstances that the release should cover future as well as present and past liability. The policy covered partial disability following total disability. It did not cover partial disability preceding total disability. Under such circumstances we think the release given is valid and conclusive. 53 Corp. Jur. 1205, note 25, and cases there cited.

Plaintiff also urges as against the release that the evidence tended to show a mutual mistake with reference to its execution. The verdict of the jury is against this contention, and, moreover, since the final judgment in the case was entered December 20, 1933, the Civil Practice act was not in force, and assuming a mutual mistake under the practice then applicable, relief could have been obtained by plaintiff only in a court of equity. Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; City of Chicago v. Sexton, 115 Ill. 230; Foley v. Friestedt, 175 Ill. App. 636.

Irrespective of the release, there are several reasons why as a matter of law plaintiff on this record was not entitled to recover. Whether we consider his claim as one for disability for 52 weeks commencing February 25, 1931, as was alleged in his amended declaration, or a similar claim for 52 weeks beginning August 25, 1930, as averred in the amendment to the declaration filed at the close of all the evidence, the claim is for a total disability commencing subsequent to June 26, 1930, on which date the policy expired, and under the express terms of the policy plaintiff is not entitled to recover. The provision of the policy is clear in excluding the allowance of any claims "unless disability resulting therefrom begins while this policy is in force." The

The policy was in effect in a few days, so I secured the funds in advance for partial liability from which [illegible] had fully recovered. It is fair to presume that it was the intention of the parties under the circumstances that the carrier should insure totally as well as present and past liability. The policy covered partial liability following total liability. It did not cover partial liability preceding total liability. Under such circumstances to which the release given is valid and conclusive. So ordered. Ibid; more so, and cases cited.

Liability also arises on behalf of the relator and the railroad tended to show a mutual mistake with reference to its existence. The verdict of the jury is against this contention, and, moreover, since the final judgment in the case was entered December 30, 1931, the first Employers Act was in 1934, not assuming a mutual mistake under the qualified new liability, relief could have been obtained by liability only on a basis of mutual mistake. Brown-Ellis Inc. Co. v. Barnes, 67 III. 102; Ruff of Illinois v. Indus. Ill III. 630; Ruler v. Takahashi, 170 III. 409, 126.

Irrespective of the release, there are several reasons why a matter of law liability on this record was not established in recovery. Further we consider his claim as one for liability for 22 weeks commencing February 25, 1931, as the claimed in his amended declaration, or a similar claim for 22 weeks beginning August 25, 1931, as evidenced in the amendment to the [illegible] filed at the close of all the evidence. The claim is for a total disability commencing December 16, 1930, as [illegible] the policy limited, and under the express terms of the policy liability is not multiplied to recovery. The provision of the policy is clear in stating the allowance of any claim "within liability resulting therefrom during which this policy is in force." The

policy also provides that the filing of proof of loss within the time stated is a condition precedent to liability. The declaration alleged that plaintiff had complied with all the provisions of the policy. There is no proof in the record of compliance with this provision.

It is urged that defendant waived such proof of loss by the letter of August 27, 1931, denying liability for the claim made. An allegation of performance is not supported by evidence of waiver of performance. Hamilton Co. v. Channell Chemical Co., 307 Ill. 362; Dvorak v. Hartford Fire Ins. Co., 253 Ill. App. 76; Trichelle v. Sherman & Ellis, Inc., 259 Ill. App. 346; Moore v. Nat'l Fire Ins. Co., 275 Ill. App. 1; Goodale v. Midwest Dairy Products Co., 278 Ill. App. 252.

On the uncontradicted evidence we hold that plaintiff could not recover, and therefore, irrespective of other alleged errors, the judgment in this case should be affirmed. However, if we regard the controlling issues as of fact, the verdict of the jury must be regarded as conclusive. For these reasons the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

policy also provides such the filing of proof of loss within the time stated is a condition precedent to liability. The insurance alleged that liability had commenced with all the provisions of the policy. There is no proof in the record of compliance with that provision.

It is urged that defendant waived such proof of loss by the letter of August 27, 1931, denying liability for the claim made. An allegation of waiver is not supported by evidence of waiver of waiver. Hamilton Co. v. Continental Ins. Co., 107 Ill. 502; Phoenix v. Lachner Fire Ins. Co., 224 Ill. App. 78; Fidelity v. Hartford v. Ill., 250 Ill. App. 388; Moore v. Ind'l Life Ins. Co., 275 Ill. App. 2; Cassell v. Aetna Life Insurance Co., 290 Ill. App. 222.

On the uncontradicted evidence we hold that plaintiff could not recover, and therefore, in view of other alleged errors, the judgment in this case should be affirmed. However, lest we regard the controlling issues as at issue, the ruling of the Jury must be reversed as contrary. For these reasons the judgment of the trial court is affirmed.

AFFIRMED.

McGuire, P. J., and Gordon, J., concur.

38524

STELLA SWANIGAN, Appellee, v. MAMIE G. DILL, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 641

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action of forcible entry and detainer and upon trial by jury, there was a motion by plaintiff for an instruction in her favor, upon which the court reserved its ruling in conformity with rule 175 of the Municipal court, which, in substance, is the same as section 68 of the Civil Practice act (Ill. State Bar Stats., 1935, par. 196, chap. 110.) The jury returned a verdict for defendant, whereupon, on motion of plaintiff, the court entered a judgment non obstante veredicto for plaintiff, and defendant has appealed.

While section 68 and rule 175 have changed the practice heretofore existing in this state as to the entry of judgments non obstante veredicto, the rules of law to be applied in case of motions for an instructed verdict have not been thereby changed, and the question here is whether the plaintiff on the evidence was entitled to an instructed verdict in her favor.

Defendant contends that plaintiff was not entitled to such instruction and further that the court erred in excluding evidence offered in her behalf.

The premises in question are known as 6432 Rhodes avenue, Chicago, are improved and occupied by defendant as a home. She

[illegible]

[illegible]

[illegible]

entered into possession under a contract in writing made May 20, 1931, whereby plaintiff agreed to sell and defendant to buy the premises for the sum of $8,000, $1,400 of which was paid in cash, and defendant agreed to pay the balance of $6,600 in installments of $40 a month, plus six per cent interest on the whole amount from time to time remaining unpaid. The contract provided that when the further sum of $2,600 should have been paid on the principal of the purchase price, plaintiff would convey to defendant title by warranty deed, taking the note of defendant secured by a first purchase money mortgage for the balance. The contract also provided that upon default by defendant and upon sixty days' written notice, the contract might be determined by plaintiff and the payments made thereunder forfeited and retained by plaintiff in full satisfaction of damages, and that time should be of the essence of the agreement.

In appropriate blanks upon the back of the contract which was put in evidence by plaintiff are credits for additional payments made by defendant beginning June 20, 1931, and continuing to and including September 7, 1934. Neither as to the amounts paid nor as to the dates of payments are these credits uniform, showing an intention on the part of plaintiff to waive the provisions of the contract that the time of payment should be of the essence thereof and that the installments should be in the amount of $40 each. The record shows proof of payments which are not credited on the contract and shows total payments made thereunder amounting to more than $3,700. December 10, 1934, plaintiff gave written notice to defendant that she was in arrears in the sum of $691.32, less any sums received by plaintiff from certain tax warrants given by defendant in part payment, and plus certain small sums due for taxes and special assessments. The notice stated that plaintiff had elected to reinstate the clause making time of the essence of the contract and also to reinstate the

entered into possession under a contract in writing made May 2, 1952, whereby plaintiff agreed to sell and defendant to buy the premises for the sum of $8,000, $3,000 of which was paid in cash, and defendant agreed to pay the balance of $5,000 in instalments of $60 a month, plus six per cent interest on the whole amount from time to time remaining unpaid. The contract provided that upon the further sum of $2,000 should have been paid on the principal of the purchase price, plaintiff could convey to defendant title by warranty deed, taking the note of defendant secured by a first mortgage upon the premises. The contract also provided that upon default by defendant and upon sixty days' written notice, the contract might be terminated by plaintiff and the payments made thereunder forfeited and retained by plaintiff in full satisfaction of damages, and that time should be of the essence of the agreement.

In appropriate blanks upon the back of the contract which was put in evidence by plaintiff are credits for additional payments made by defendant beginning June 2, 1952, and continuing to and including September 7, 1954. Neither in the amounts paid nor in the dates of payments are these credits uniform, showing no intention on the part of plaintiff to waive the provisions of the contract that the time of payment should be of the essence thereof and that the instalments should be in the amount of $60 each. The record shows proof of payments which are not credited on the contract and shows total payments made thereunder amounting to more than $3,[illegible]. December 10, 1954, plaintiff gave written notice to defendant that she was in default to the sum of $483.00, less any sums received by plaintiff from a certain bar mortgage given by defendant in part payment, and also notice that when the bank and legal assessments were paid, and plus certain small sums for the bank and legal assessments. The notice stated that plaintiff had elected to rescind the contract and also to retain the sums paid by defendant under the contract and also to retain the

provision that the contract should draw interest at the rate of six per cent. The notice also stated that unless payment was made within sixty days of the receipt thereof the agreement would be determined and all payments made thereunder forfeited, and that forcible entry and detainer proceedings would be instituted. February 13, 1935, plaintiff sent to defendant by registered mail a written declaration of forfeiture, which was received by defendant February 15, 1935. A written demand for possession dated February 13, 1935, was deposited in the United States mail in Chicago on February 14, 1935, and this suit was filed the same day.

The action is based on paragraph 5 of section 2 of the Forcible Entry and Detainer act (Ill. State Bar Stats., 1935, chap. 57, p. 1702) and section 3 of the same act, as amended by the Laws of 1931.

Forfeiture in a case of this kind is not favored by the law. Neither the notice of December 10, 1934, the declaration of forfeiture of February 13, 1935, the demand for possession, nor the evidence in the case, shows definitely, or with certainty, the precise amount necessary for defendant to pay in order to remove the defaults. Plaintiff in proving up her case offered no evidence tending to show that the allegations of the notice and the declaration of forfeiture were in fact true. These documents were admitted over the objection of defendant that the same were not evidence of the truth of the facts stated therein. Defendant offered evidence tending to show that only $105.42, with interest and taxes, was due, and that she had offered to pay these but that plaintiff had declined to accept the payments. The proof does not show an actual technical tender of this amount, but there was proof from which waiver of a technical tender could be inferred.

The defense interposed was (and defendant offered evidence tending to show) that defendant having ceased to make payments

provided that the payments should cease forever if the rate of exchange fell below a fixed minimum. The notice also stated that payments would within sixty days of the receipt thereof the expenses would be determined and all payments made thereafter deducted, and that further sums and certain payments would be instituted.

February 12, 1928, plaintiff came to defendant by registered mail a written declaration of forfeiture, which was received by defendant February 14, 1928. A written demand for possession sent February 14, 1928, was deposited in the United States mail in Chicago on February 14, 1928, and this was the final the same day.

The action is based on paragraph 5 of section 2 of the Illinois Dwelling and Dwellings act 111. Ill. Ann. Stat. 1928, chap. 57, p. 1201 and section 6 of the same act, as amended by the laws of 1923.

Forfeiture in a case of this kind is not favored by the law. Citing the notice of December 15, 1927, the declaration of forfeiture of February 12, 1928, the demand for possession, nor the evidence in the case, show definitely, or with certainty, the precise amount necessary for defendant to pay in order to prevent the forfeiture. Plaintiff in proving up her case offered no evidence tending to show that the allegations of the notice and the declaration of forfeiture were in fact true. These documents were admitted over the objection of defendant that the same were not evidence of the truth of the facts stated therein. Defendant offered evidence tending to show that only $102.42, with interest and costs, was due, and that she had offered to pay these but that plaintiff had refused to accept the payments. The proof does not show an actual accrued liquor of this amount, but there was proof from which number of a tentative amount could be inferred.

The defense interposed was (and defendant offered evidence tending to show) that defendant having caused to make payments

under the contract after September 27, 1933, the matter was taken up with defendant by plaintiff through her agent, Mr. Kiser, and that an agreement was made whereby plaintiff agreed to reduce the monthly payments to be made on the principal from $40 to $30 a month and the rate of interest from six to five per cent; that at that time defendant turned over to Mr. Kiser, Board of Education warrants to the amount of $75, and cash to the amount of $71.50, which was accepted in payment of interest at the rate of five per cent up to December 20, 1933; that Kiser promised to leave at the First National Bank of Englewood (which then held the contract for collection) a letter stating that reduction in payments should be accepted as agreed; that plaintiff told defendant this reduction was agreeable to her and promised that the letter would be sent, which was never in fact sent; that defendant made certain improvements on the premises relying on these promises and that she was not therefore in default for the amount demanded in the notice of forfeiture but only for $135.42, which after the notice was served, she through her agent offered to pay, but the offer was refused. Defendant contends that plaintiff having lulled defendant into a sense of false security and obtained these payments may not now enforce the terms of the original contract oppressively.

Much of the evidence offered was stricken out erroneously, we think, but enough was admitted to create an issue of fact for the jury, and the court therefore erred in entering a judgment in favor of plaintiff, notwithstanding the verdict of the jury, returned in favor of defendant. As a matter of fact, three juries (the record shows) have returned the same verdict on the issues. We do not doubt another jury will return a like verdict. The case is not unlike that of Craft v. Calmeyer, 274 Ill. App. 296, where judgment for defendant

under the contract after September 27, 1922, the matter was taken up with defendant by plaintiff through her agent, Mr. Kline, and that an arrangement was made whereby plaintiff agreed to reduce the monthly payments to be made on the principal from $10.00 a month and the rate of interest from six to five per cent; that on that line defendant turned over to Mr. Kline, Trust of Insurance premiums to the amount of $49, and credit to the amount of $72.80, which was accepted in payment of interest at the rate of five per cent up to December 28, 1922; that Kline promised to leave at the first mentioned Trust of Kingwood (which then held the contract for collection) a letter stating that modification in payments should be accepted as agreed; that plaintiff relied upon this representation and promised that the letter would be sent, which was never in fact sent; that defendant made certain improvements on the premises relying on these promises and that she did not default in interest for the amount commenced in the matter of foreclosure but only for $120.48, which after the matter was started, she tendered but which offered to pay, but the offer was refused. Defendant contends that plaintiff having failed defendant into a state of false security and obtained these payments may not now enforce the terms of the original contract exactly.

Much of the evidence offered was extreme and irrelevant, we think, but enough was admitted to create an issue of fact for the jury, and the court therefore erred in ordering a judgment in favor of plaintiff, notwithstanding the verdict of the jury, rendered in favor of defendant. As a matter of fact, three jurors (the issue shown) have returned the same verdict on the issues. We do not doubt another jury will return a like verdict. The case is not unlike that of Jones v. Dunmore, 171 Ill. 194, where judgment for defendant

under circumstances quite similar was affirmed. The authorities were there reviewed. Here, as there, plaintiff "lulled the defendants into a sense of false security," and then after having obtained the payment of substantial sums of money, seeks to reinstate the strict terms of the original contract and to appropriate to her own use the money paid under the contract. Under such circumstances the court erred in entering judgment contrary to the verdict of the jury.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McCurely, P. J., and O'Connor, J., concur.

38359

W. T. KINDER,
Appellee,

vs.

DENOYER-GEPPERT CO., a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 642

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff was employed by the defendant under a written contract for the years 1931, 1932 and 1933, for which he was to receive $10,000 a year. He performed the services for which he was employed and was paid the salary for 1931, but about January, 1932, on account of the depression and the financial condition of defendant, plaintiff was paid at the rate of $10,000 per annum less 20 per cent, until about May, 1932, when there was a further reduction of 30 per cent and he was paid the salary less the reductions.

Plaintiff contends that he never agreed to any reduction of his salary but that he and defendant entered into an oral agreement whereby, on account of defendant's financial condition and the depression, part of plaintiff's salary would be withheld and this would later be paid in full. On the other hand, defendant's theory is that plaintiff agreed to the reductions above mentioned, and that he has been paid in full. Plaintiff sued to recover the balance of his $10,000 salary for the years 1932 and 1933. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $6534.37, the amount of his claim, and defendant appeals.

The record discloses that defendant is engaged in the manufacture and sale of maps, charts, globes, and other school supplies; that in 1922 plaintiff was employed by the defendant for about two and one half years, and was again employed when on January 5, 1931, plaintiff and defendant entered into a written agreement whereby plaintiff was employed as defendant's field director for a period

three years at an annual salary of $10,000. By the terms of the agreement plaintiff was to spend practically all of his time on the road supervising defendant's salesmen, hiring new ones, discharging inefficient ones, and training salesmen in the art of selling maps, charts, and other school supplies. Plaintiff began his work under the contract and continued for the three years. All the evidence is that his work at all times was satisfactory although sales dropped off very materially on account of the depression.

Late in December, 1931, there was a meeting of defendant's employes including plaintiff, at which one of defendant's officers stated that on account of the depression there was a great falling off in defendant's business; that it was being pressed by the banks to which it owed considerable money and it was necessary to reduce all salaries and wages 20 per cent. Apparently all the employees were paid their salaries or wages, less the 20 per cent. In the latter part of April, for the same reasons, there was a further reduction in the wages and salaries of 30 per cent more and apparently all the employees, including plaintiff, were paid their wages or salaries after deducting the additional 30 per cent.

January 14, January 28, and February 11, plaintiff received three checks for the amount of his salary less the 20 per cent; on each of these checks plaintiff endorsed, "To apply on salary." Afterward this endorsement was not placed on plaintiff's subsequent checks, and beginning May 5, 1932, after the second reduction had been made, plaintiff received a check about every two weeks for the amount of his salary, after the two deductions had been made, until about August, 1932. On most of the checks defendant, before sending them to plaintiff, endorsed the following: "Accepted as salary in full for period covered." The checks were then all endorsed by plaintiff and went through the banks in the

three years at an annual salary of $[illegible]. By the terms of the agreement plaintiff was to spend successively all of his time on the road supervising defendant's business, giving new ones, discharging inefficient ones, and training salesmen in the art of selling wood, stave, and other cabinet supplies. Plaintiff began his work under the contract and continued for the three years. All the evidence is that his work at all times was satisfactory although also dropped off very materially on account of the depression.

Late in December, 1930, there was a meeting of defendant's employes including plaintiff, at which one of defendant's officers stated that on account of the depression there was a great falling off in defendant's business; that it was being pressed by the banks to which it owed considerable money; and it was necessary to reduce all salaries and wages 20 per cent. Accordingly all the employes were paid their salaries or wages, less the 20 per cent. In the latter part of April, for the same reason, there was a further reduction in the wages and salaries of 20 per cent more and apparently all the employes, including plaintiff, were paid their wages or salaries after deducting the additional 20 per cent.

Monday 12, January 30, and February 13, plaintiff received three checks for the amount of his salary less the 20 per cent; on each of these checks plaintiff endorsed, "In full of salary." Plaintiff this statement was not signed by plaintiff's supervisor which, not returning May 7, 1931, after his weekend trip had been made, plaintiff received a check each week for the amount of his salary, after the deductions had been made, until about August, 1931. On most of the checks defendant, before sending them to plaintiff, endorsed the following: "Accepted as salary in full for period covered." The checks were then all endorsed by plaintiff and sent through the banks in the

regular way. About August 25, 1932, plaintiff was paid in cash, the money being delivered by Brink's Express Company, which obtained plaintiff's receipts, which stated the money was for "salary for the two weeks period." There are thirty-six such receipts.

Defendant's contention is that plaintiff's acceptance of the checks endorsed as above stated, his acceptance of the money and execution of the receipts, together with letters and telegrams, amounted to at least "fifty-four accords and satisfactions;" that this documentary evidence about which there is no dispute, does not "in any way present a question of fact to be weighed. It is clear therefore that the only question raised by this evidence is one of law, and that the error of the trial Judge, if any, was one of law and not of fact." On the other side, plaintiff's position is that he did not consent to the reductions of his salary, but on the contrary, was insisting throughout that he was entitled to the $10,000 a year; that he took the checks and money from defendant with the two reductions, as an accommodation to defendant with the understanding and agreement that the amount withheld would be later paid to him in full. In their brief plaintiff's counsel say, "plaintiff was not consenting thereby to any modification of the terms of his written contract, but was, on the contrary, insisting upon his rights under said written contract; that his acceptance of the lesser amounts was considered by him as an accommodation to the defendant in a reported emergency and as constituting a temporary withholding of money due under the written contract which would be later repaid by defendant; that by words and actions of its officers the defendant agreed with plaintiff's interpretation," and therefore the question was one of fact, and the court having found the issues in favor of plaintiff, the finding cannot be disturbed, under the law, unless this court is of opinion that the finding

regular way. About August 20, 1928, plaintiff was paid in cash, the money being delivered by Brian's express company, which obtained plaintiff's receipts, which stated the money was for "salary for the two weeks period." There are little-six such receipts.

Defendant's contention is that plaintiff's acceptance of the checks entered as above stated, his acceptance of the money and execution of the receipts, together with letters and telegrams, amounted to at least "fifty-four accords and satisfactions;" that while documentary evidence about which there is no dispute, does not in any way present a question of fact to be weighed. It is clear therefore that the only question raised by this evidence is one of law, and that the court at the trial judge, if any, was one of law and not of fact." In the court rule, plaintiff's position is that he did not assent to the reductions of his salary, but on the contrary, was insisting throughout that he was entitled to the $10,000 a year; that he took the checks and money from defendant with the two reductions, on a recommendation in safe-keeping with the understanding and agreement that the amount wrongfully would be later paid to him in full. In their brief plaintiff's counsel say, "plaintiff was not consenting thereby to any modification of the terms of his written contract, but was, on the contrary, insisting upon his rights under said written contract; that his acceptance of the lesser amounts was accompanied by him as a reservation in the document in a recorded memorandum and as constituting a temporary expedient in a recorded memorandum and as constituting a temporary expedient in a manner the exact contract which would be later paid by defendant; that by words and actions of its officers the defendant assented with plaintiff's interpretation." Our construction of the question was one of fact, and the court having found the issues in favor of plaintiff, the finding cannot be disturbed. Under the law, unless this court is of opinion that the finding

is against the manifest weight of the evidence.

If, as plaintiff contends, the question to be decided by the trial court was one of fact upon conflicting evidence, we would not be warranted in disturbing the finding unless it was against the manifest weight of the evidence. Donelson v. The East St. L. Ry. Co., 238 Ill. 625; Walters v. Checker Taxi Co., 265 Ill. App. 329.

The law is also well settled in this State as stated by counsel for defendant - "that where a payment is offered in full of an amount in dispute the creditor cannot accept it without the condition. ***" and "Although the creditor protests against accepting as payment in full, if he accepts payment so tendered, it is an accord and satisfaction." Snow v. Griesheimer, 130 Ill. App. 516, affirmed 220 Ill. 106; Canton Coal Co. v. Parkin & Grandorff Co., 215 Ill. 244; In Re Est. of Cunningham, 311 Ill., 311; Central Tr. Co. of Ill. v. Hagen, 249 Ill. App. 507.

It is also the law in this State that where the amount due a creditor is ascertained and not in dispute, the payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand. Snow v. Griesheimer, 220 Ill. 106. But this rule is subject to the exception that if the debtor is in failing circumstances a smaller sum may be taken in full discharge of the debt. Curtis v. Martin, 20 Ill. 557; Winter v. Meier, 151 Ill. App. 572. And there is a further exception to the rule, i. e., that where a less sum than is claimed is tendered in full of the amount claimed, the agreement becomes executed and binding. Doyle v. Dunne, 144 Ill. App. 14; Levy v. Greenberg, 261 Ill. App. 541. The law as stated is not in dispute, but counsel disagree as to the application of the law to the facts in the instant case.

In Snow v. Griesheimer, 130 Ill. App. 516, (affirmed 220 Ill. 106) an action of assumpsit was brought to recover the balance of rent claimed under a lease under seal. The defense interposed

is against the manifest weight of the evidence.

If, on plaintiff's contention, the question to be decided by the trial court was one of fact upon conflicting evidence, we would not be warranted in overturning the finding unless it was against the manifest weight of the evidence. Dominion v. The Keet Co. L. Co., 258 Ill. 282; Wabash v. Chicago Junc. Co., 244 Ill. App. 338.

The law is also well settled in this State as stated by counsel for defendant - "that where a judgment is offered in full of an amount in dispute the creditor cannot accept it without the condition, and "although the creditor persists in claiming the balance as payment in full, it is no accord and satisfaction." Shaw v. Gatchell, 119 Ill. App. 2d, affirmed 220 Ill. 309; Taylor v. Taylor & Co., 213 Ill. 219; In re Est. of Chrystal, 193 Ill., 221; Ferrel v. Ge. of Ill. v. Stone, 197 Ill. App. 347.

It is also the law in this State that where the amount due a creditor is absolutely and can be ascertained, the payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand. Shaw v. Gatchell, 220 Ill. 309. But this rule is subject to the exception that if the debtor is in fulling circumstances a smaller sum may be taken in full discharge of the debt. Durbin v. Martin, 70 Ill. 499; Taylor v. Taylor, 193 Ill. App. 298. Not there is a further exception to the rule, i.e., that where a less sum than is claimed is tendered in full of the amount claimed, the creditor because accepts and binding. Doyle v. Bauer, 144 Ill. App. 2d; Lace v. Crawford, 221 Ill. App. 241. The law as stated is not in dispute, but counsel disagree as to the application of the law to the facts in the instant case.

In Shaw v. Gatchell, 220 Ill. App. 2d, affirmed 220 Ill. 309) an action of assumpsit was brought to recover the balance of rent claimed under a lease under seal. The defense introduced

was that there was an oral agreement between the parties whereby the montaly rental was reduced from $500 a month as called for by the lease to $416.66, and in consideration defendant was to repaper and do other work on the store. Plaintiff denied there was any such agreement but asserted that the agreement was to reduce the rent for the summer months and not for the entire term. On the trial the defendant introduced checks for the reduced amount which were marked "in full" for the respective months. The issue was submitted to the jury who found in favor of the defendant. The Appellate court affirmed the judgment as did also the Supreme court on a further appeal. The question there was held to be one of fact and not of law.

Plaintiff's evidence throughout is to the effect that there was no agreement between the parties that his salary would be reduced, but, on the contrary there was an agreement between them that defendant would pay and plaintiff would receive the reduced amount temporarily, and later when financial conditions were improved, the full salary would be paid plaintiff.

On the other hand, defendant's contention is that while plaintiff objected to taking the two reductions, he was told that the company was in financial difficulties with the banks; that it was necessary that all employees take reductions to prevent receivership, and that plaintiff would be treated the same as all other employees, including defendant's officers; that plaintiff expressly agreed to the first reduction of 20 per cent, and that by his acceptance of the checks and later the money, as shown by the evidence, there was an accord and satisfaction.

We think it obvious that the question for decision by the trial court was one of fact. He found in favor of the plaintiff, and defendant makes no argument that the finding is against the manifest weight of the evidence. In these circumstances we would not be warranted in disturbing the judgment.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P.J., and Matchett, J., concur.

was that there was an oral agreement between the parties whereby the monthly rental was reduced from $100 a month to $50 a month for the lease in 1916.34, and in consideration defendant was to repaper and do other work on the store. Plaintiff denied there was any such agreement but asserted that the agreement was to reduce the rent for the summer months and not for the entire term. On the trial the defendant introduced checks for the reduced amount which were marked "in full" for the respective months. The issue was submitted to the jury who found in favor of the defendant. The Appellate Court affirmed the judgment on the ground the Supreme Court on a further appeal. The question there was held to be one of fact and not of law.

Plaintiff's evidence throughout it is to the effect that there was no agreement between the parties that his money would be refunded, but, on the contrary there was an agreement between them that defendant would pay and plaintiff would receive the reduced amount temporarily, and later when financial conditions were improved. The full money would be paid plaintiff.

On the other hand, defendant's contention is that while plaintiff objected to taking the two reductions, he was told that the company was in financial difficulties with the bank; that it was necessary that all employees make reductions to prevent receivership, and that plaintiff would be treated the same as all other employees, including defendant's officers; that plaintiff accordingly agreed to the first reduction of $5 per week, and then by his acquiescence of the second and later the money, as shown by the evidence, there was an assent and ratification.

We think it obvious that the question for decision by the trial court was one of fact. As found in favor of the plaintiff, and defendant makes no argument that the finding is against the manifest weight of the evidence. In these circumstances we could not be warranted in disturbing the judgment.

The judgment of the Branch Court of Cook County is affirmed.

AFFIRMED.

McSURELY, J., and McNAMEE, J., concur.

38472

ANTONELLE MROZ,
Appellee,

vs.

WILLIAM P. MARTIN et al.,
Defendants.

On Appeal of DANIEL D. CRAFT, Individually and as Trustee, ELLEN S. CRAFT, DOROTHY COWLEY and EMIL FOREJT,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 642

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 7, 1934, Antonelle Mroz filed her complaint in equity to foreclose a trust deed securing an indebtedness of $1500 and interest, evidenced by a promissory note and coupons; certain of the defendants on July 24, 1934, filed their answer in which they averred that the time of payment of the $1500 had been extended by a written agreement for five years, instead of three years as alleged by plaintiff in her complaint; and that by the terms of such extension agreement the indebtedness would not become due until November 27, 1935. August 9, 1934, defendants who had filed the answer as above stated filed what is designated a counter-claim setting forth that a mistake had been made in the execution of the extension agreement and praying that it be reformed so as to show that the time of payment of the $1500 had been extended five years instead of three years. Afterward, and when a great deal of evidence had been heard by the master in chancery to whom the case had been referred, the same defendants, on November 14, 1934, by leave of court, filed an "amended counter-claim," making two new parties defendants to the amended counter-claim. In this amended counter-claim it was alleged that a mutual mistake had been made in the delivery to plaintiff of the trust deed and notes, in that the trust deed securing the note which was delivered to plaintiff was

on lot four, while at the same time the maker of the note and trust deed had also made a similar note and trust deed on lot five; and that it was the intention to deliver the note and trust deed on lot five to plaintiff instead of the note and trust deed which had been delivered to her; and the prayer of the amended counter-claim was that the trust deeds and notes be exchanged so that plaintiff would have the trust deed on lot five.

The master heard the evidence, made his report, found that no mistake had been made and recommended a decree as prayed for by plaintiff in her complaint; objections to the report were overruled and afterward the chancellor sustained the master and May 10, 1935, entered a decree in accordance with the recommendations of the master. Afterward the property was sold by the master, and July 26, 1935, his report of sale and distribution, which showed a deficiency of $778.94, was approved and a deficiency decree was entered for that amount, from which the defendants and counter-claimants appeal.

The record discloses that November 27, 1925, William F. Martin owned lots four and five in a certain subdivision in Brookfield, Illinois, and on that date executed his four promissory notes, two for $250 and two for $1500 each, and to secure the payment executed two trust deeds, one on lot four and the other on lot five. Apparently the two loans for $1750 were made by Frank J. Mancl, who was in the real estate business, and on May 1, 1926, he sold two of the notes for $250 and $1500 and trust deed on lot five to Emil Forejt, who was made a defendant to the second amended counter-claim, and July 3, 1926, Frank J. Mancl sold the other two notes and trust deed on lot four to plaintiff. Some time afterward, apparently, William F. Martin, the mortgager, who owned the two lots, sold them to "Daniel D. Craft, trustee," and some time thereafter "Craft, McConaughy & Wolcott" entered into articles of agreement with Dorothy Cowley for the purchase and sale of lot four to Dorothy Cowley,

on lot four, which at the same time for water of the main and trust deed had also made a similar main and trust deed on lot five; and that it was the intention to deliver the main and trust deed on lot five to plaintiff instead of his main and trust deed which had been delivered to her; and the wrongs of the amended counter-claim was that her trust deeds had been substituted so that plaintiff would have the legal lien on lot five.

The master heard the evidence, made his report, found that defendant had been made and consummated a decree as prayed for by plaintiff in her complaint; objections to the report were overruled and afterward the chancellor entered the decree and July 19, 1888, entered a decree in accordance with the recommendations of the master. Afterward the property was sold by the master, and July 24, 1888, his report of sale and distribution, which showed a balance of $772.64, was approved and a deficiency decree was entered for that amount, from which the defendants had appealed.

The record discloses that December 27, 1887, William F. Martin owned lots four and five in a certain subdivision in Rockford, Illinois, and on that date executed in four promissory notes, two for $500 and two for $1000 each, and to secure the payment executed two trust deeds, one on lot four and the other on lot five. Subsequently the two loans for $1000 were made by Frank E. Bunel, who was in the real estate business, and on Jan 1, 1888, he held two of the notes for $500 and $1000 and trust deed on lot five to Hull Morris, who was also a partner in the slightly mentioned concern, and July 5, 1888, Frank E. Bunel sold the other two notes and trust deed on lot four to plaintiff. Some time afterward, apparently, William F. Martin, the mortgagor, the owner of the lots, sold them to "Daniel J. Hull, trustee," but deed that ever-after "Hull, Bunel Company" entered into articles of agreement with Morris Hull for the conveyance and sale of lot four to Morris Company,

subject to the mortgage of $1750. And it seems also to be conceded by the parties that similar articles of agreement were entered into by Craft, McConaughy & Wolcott to sell lot five to Mae G. Arnett and Aaron F. Arnett, her husband. We think it also appears that the $250 notes have been paid, leaving a balance due of $1500 on each mortgage indebtedness. When the $1500 became due on November 27, 1930, Frank J. Mancl, who states he is the legal owner and holder of the $1500 note made by Willaim P. Martin, entered into an extension agreement with "Daniel D. Craft, trustee, and Dorothy Cowley." The extension agreement states that the trust deed securing the payment of that $1500 was on lot five, and it was agreed that the time of payment of the $1500 be extended for five years from November 27, 1930, i. e., until November 27, 1935.

On the same day, November 27, 1930, Frank J. Mancl entered into two extension agreements with "Daniel D. Craft, trustee, Mae G. Arnett and Aaron F. Arnett," in which it is stated that Mancl is the legal owner of the two notes made by William P, Martin, one for $250 and one for $1500. By one of the agreements the time of payment of the note for $250 was extended for a period of three years from November 27, 1930, and the other extended the time of payment of the note for $1500 for a like period of three years, i. e., that the time of payment of the two notes secured by the trust deed on lot four was extended three years, namely, until November 27, 1933.

From the foregoing evidence, which is uncontradicted, it appears that plaintiff, Antonelle Mroz, purchased the two notes made by Martin, one for $250 and the other for $1500, and to secure the payment was given a trust deed on lot four. She also received an alleged extension agreement, likewise on lot four. The evidence also shows that Emil Forejt was given his two notes and trust deed on lot five, and afterward the extension agreement on lot five. The evidence shows that all interest and other moneys were paid to Mancl

subject to the mortgage of $1750. And it seems also to be conceded by the parties that similar satisfaction of mortgages were entered into by Grant, McGonaughy & Wolcott to sell lot five to Mae G. Arnett and Aaron F. Arnett, her husband. We think it also appears that the $250 notes have been paid, leaving a balance due of $1500 on each mortgage indebtedness. When the $1500 became due on November 27, 1930, Frank T. Hamel, who stands as the legal owner and holder of the $1500 note made by William A. Martin, entered into an extension agreement with "Daniel H. Graff, trustee, and Beverly Qwiley." The extension agreement states that the trust deed securing the payment of that $1500 was on lot five, and it was agreed that the time of payment of the $1500 be extended for five years from November 27, 1930, i. e., until November 27, 1935.

On the same day, November 27, 1930, Frank T. Hamel entered into two extension agreements with "Daniel H. Graff, trustee, Mae G. Arnett and Aaron F. Arnett," in which it is stated that Hamel is the legal owner of the two notes made by William A. Martin, one for $250 and one for $1500. By one of the agreements the time of payment of the note for $250 was extended for a period of three years from November 27, 1930, and the other extended the time of payment of the note for $1500 for a like period of three years, i. e., that the time of payment of the two notes secured by the trust deed on lot four was extended three years, namely, until November 27, 1933.

Upon the foregoing evidence, which is uncontradicted, it appears that plaintiff, Antonette Kren, purchased the two notes made by Martin, one for $250 and the other for $1500, and to secure the payment was given a trust deed on lot four. She also received an alleged extension agreement, likewise on lot four. The evidence also shows that Earl Forsyth was given his two notes and trust deed on lot five, and afterward the extension agreement on lot five. The evidence shows that all interest and other moneys were paid to Hamel

or his real estate firm, who in turn delivered it to the two owners of the notes, plaintiff Mroz and defendant Forejt. Just why Frank J. Mancl entered into the three extension agreements, as above mentioned, in which he states that he is the legal owner and holder of the notes and trust deeds, we are unable to understand, although no point is made by counsel in this court of this fact, and apparently no point was made before the master or the chancellor. The uncontradicted evidence, however, is that Frank J. Mancl did not own the notes or trust deeds, because one set of notes and trust deed was owned by plaintiff and the other by Emil Forejt. Furthermore, in each of the three extension agreements Daniel D. Craft, trustee, is the apparent owner of the two lots, but the nature of his trusteeship is a secret. Apparently Dorothy M. Cowley had entered into an agreement to purchase lot four from "Craft, McConnaughy & Wolcott," but as to why that firm had the right to enter into an agreement to sell the lot, or what claim it had to the lot, we are not informed. Dorothy Cowley, it is stated, was living on lot four but she executed an extension agreement on lot five. And apparently Mae G. Arnett was purchasing lot five but entered into an extension agreement to extend the time of payment of the $1500 on lot four.

The record is much confused, but much more so are the dealings between Craft and his associates, who were in the real estate business, and Frank J. Mancl, who was also in the same business. But upon a consideration of all the evidence we think it obvious that the chancellor would be wholly unwarranted in finding that a mistake had been made in the sale of the notes and trust deeds to plaintiff and to Forejt, as contended for in the amended counterclaim. Forejt purchased his notes and trust deed from Frank J. Mancl on May 1, 1926, and plaintiff purchased her notes and trust deed from Frank J. Mancl on July 3, 1926. There is no warrant in the contention of the counter-claimants that it was the intention

or his real estate firm, who in turn delivered it to the two owners of the notes, plaintiff Ure and defendant Ortelt. Just why Frank J. Hanzl entered into the three extension agreements, as above mentioned, is which we state that he is the legal owner and holder of the notes and trust deeds, we are unable to understand, although no proof is made by counsel in this court of this fact, and apparently no proof was made before the master or the chancellor. The uncontradicted evidence, however, is that Frank J. Hanzl did not own the notes or trust deeds, because one set of notes and trust deed was owned by plaintiff and the other by Emil Ortelt. Furthermore, in each of the three extension agreements Daniel H. Ortelt, trustee, is the guarantor under of the two lots, but the nature of his transaction is a secret. Apparently Dorothy K. Cowley had entered into an agreement to purchase lot four from "Ortelt, McCormick & Wolcott," but as to why that firm had the right to enter into an agreement to sell the lot, or what claim it had to the lot, we are not informed. Dorothy Cowley, it is stated, was living on lot four but she executed an extension agreement on lot five. And apparently Ike G. Arnett was purchasing lot five but entered into an extension agreement to extend the time of payment of the $1500 on lot four.

The record is much confused, but much more so are the dealings between Ortelt and his associates, who were in the real estate business, and Frank J. Hanzl, who was also in the same business. But upon a consideration of all the evidence we think it obvious that the chancellor could be wholly unwarranted in finding that a mistake had been made in the make up of the notes and trust deeds to plaintiff and to Ortelt, as contended for in the amended counter-claim. Ortelt paramoured his notes and trust deed from Frank J. Hanzl on May 1, 1928, and plaintiff purchased her notes and trust deed from Frank J. Hanzl on July 2, 1928. There is no warrant in the contention of the counter-claimants that it was the intention

of Manel to sell to Forejt the notes and trust deed on lot four, and to plaintiff the notes and trust deed on lot five. All of the evidence is to the contrary.

The defendants and counter-claimants further contend the court did not have jurisdiction of certain indispensable parties and for that reason the decree cannot stand. The argument seems to be that the evidence discloses that Rylnad A. Wolcott and his wife now own lot five, and that they should have been made parties defendant. There is no merit in this contention. The foreclosure was of lot four. Lot five was in no way involved.

A further contention made is that "The decree of sale, entered on May 10, 1935, gave the plaintiff a personal judgment against Craft and awarded her an execution for any deficiency that might be reported by the master after sale." This is the entire argument on that point, except the citation of three cases.

By the decree of foreclosure the master was to execute the decree by the sale of the property, and in case the indebtedness was not paid in full it provided that out of the proceeds he retain his fees and pay the balance to the plaintiff; "that if a deficiency is shown the courtretains jurisdiction of the rents, issues and profits of the premises for the purpose of appointing a receiver, retains jurisdiction to enter a personal decree in favor of plaintiff and against 'Daniel D. Craft, personally liable for the amount due said plaintiff,' and 'the plaintiff shall be entitled to execution against the defendant Daniel D. Craft, and that execution shall issue therefor as at common law against said defendant.'" But the error, if any, in this respect is of no consequence because the property was afterward sold and there was a deficiency of $778.94, which Daniel D. Craft was ordered to pay, and plaintiff was awarded an execution therefor. The foreclosure decree which awarded an execution in case of a deficiency against Craft was not final, (Hartman v.

of blood in hell to pay; his notes and bonds dead on his hands, and the plaintiff the noble and brave man who saved his life. All of this evidence is in the mistake.

The defendants and counterclaimants contend the court did not have jurisdiction of certain indispensable parties and for that reason the decree cannot stand. The argument seems to be that the evidence disclosed that Ignatz A. Sokoloff and his wife were our lot, and that they should have been made parties defendants. There is no merit in this contention. The preponderance was of lot four. Lot five was in no way involved.

A further contention made is that the decree of sale, entered on May 17, 1923, gave the plaintiff a personal judgment against Grafl and granted her an execution for any deficiency that might be received by the sheriff after sale. This is the main argument on that point, except the citation of brief cases.

By the decree of foreclosure the master was to execute the decree by the sale of the property, and in case the indebtedness was not paid in full it provided that out of the proceeds he retain his fees and pay the balance to the plaintiff. "Had it a deficiency it shows the contemplated jurisdiction of the master, issues and profits of the premises for the purpose of supplying a receiver, retains jurisdiction to enter a personal decree in favor of plaintiff and against Joseph C. Grafl, personally liable for the amount due said plaintiff." and "the plaintiff would be entitled to execution against the defendant Joseph C. Grafl, and that execution shall issue thereon as at common law against said defendant." But the error, if any, in this respect is of no consequence because the property was afterward sold and there was a deficiency of $972.77, which Joseph C. Grafl was ordered to pay, and plaintiff was granted an execution therefor. The intermediate decree was merely an adjudication in case of a deficiency against Grafl was not final. (Lorenzen v.

Pistorius, 240 Ill. 568) and the sale having established a deficiency there was no injury to Craft and he cannot complain.

Defendants further contend that the court erred in ordering defendant Craft to turn over $140 which he had collected from defendant Cowley at the rate of $35 a month, beginning with the month of March, 1935. The argument in support of this contention seems to be that Craft owned lot four and had entered into an agreement with defendant Dorothy Cowley to sell the lot to her, and under the terms of the contract she was to pay $35 a month until the purchase price was paid. As we have above stated, the contract for the sale and purchase of lot four is between "Craft, McConaughy & Wolcott" as sellers, and Dorothy Cowley as purchaser. But in any event the record discloses that in February, 1935, plaintiff made a motion for the appointment of a receiver of the premises; this motion was continued from time to time, the orders of continuance stating that in case the court should later appoint a receiver the appointment should be effective as of the date when the application was made, in February. We have been unable to find in the record the order appointing the receiver, but there is an order in the record, entered July 10, 1935, in which it is found that Craft had collected $35 a month from Dorothy Cowley for March, April, May and June, 1935, and it was ordered that he turn over this $140 to the receiver; and it was further ordered that Dorothy Cowley pay the receiver $35 a month, beginning with July, 1935, for the use of the premises. It is apparent that the court treated the $35 a month paid by Cowley to Craft as the reasonable rental value of the premises. We are unable to say that the court erred in this matter.

We might say that if the purchasers of the two lots have suffered damages through no fault of their own, but through the fault, negligence or mistake of others, they may have their remedy in a proper forum.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely, P.J., and Matchett, J., concur.

Liberty, Jan 1?, 1890 (not the date during which a certain money there was no liberty in Ireland and in Boston) complains.

Defendants further contend that the court erred in admitting testimony tending to show that the plaintiff's husband, Dorothy Dwight, on the 1st day of March, 1890, the plaintiff was in the city of Boston, including with the month of March, 1890. The plaintiff in support of this contention seems to be that Dwight would let her not have money like an ordinary man. Dorothy Dwight testified in chief that he left home, and under the terms of the contract she was to pay $20 a month until the purchase price was paid. As we have above stated, the evidence for the wife and witness, and testimony to contradict, [illegible] a [illegible] witness, and testimony to contradict.

[illegible] Dwight made a motion for the appointment of a receiver of the product; this motion was continued from time to time, the return of [illegible] stating that in case the court should later appoint a receiver the appointment should be effective as of the date when the application was made, in February. To have been worth [illegible] in the amount due after appointing the receiver, but [illegible] in an order in the record, [illegible] 1890, in which it is found that Dwight had collected $20 a month from Dorothy during the March, April, May and June, 1890, and it was ordered that he hand over this sum to the receiver; and it was further ordered that Dorothy Dwight pay the receiver $20 a month, beginning with July, 1890, for the use of the premises. It is apparent that the court treated the $20 a month paid by Dorothy as the reasonable rental value of the premises. We see nothing to say that the court erred in this ruling.

It might say that if the proceeds of the [illegible] had been [illegible] equitable or [illegible] of [illegible], but [illegible] the [illegible] proper form.

The decree of the Circuit Court of Ind [illegible] is affirmed.

AFFIRMED.

Rotary, J.J., [illegible], J., [illegible].

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38088

THOMAS G. McGAY,
Appellee,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

283 I.A. 642

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by defendant from a judgment for $6,452.07 entered upon a verdict of a jury. This was the second trial of the cause. In the first there was a verdict and judgment for plaintiff in the sum of $5,648.61. Defendant appealed and we reversed the judgment and remanded the cause. (See 268 Ill. App. 622 Abst.)

Upon the second trial the testimony given upon the first trial, also the exhibits, were introduced by stipulation. The only additional evidence introduced at the second trial is the testimony of the cashier at defendant's Chicago office, who, called as a witness for defendant, stated that under the regular practice followed by defendant a preliminary term contract was issued as a separate document or placed on the regular policy. "It is a stamped endorsement." "The preliminary term is given a special number that has never been used before and is never used again. That covers this period of this contract for the preliminary period."

As we view the instant appeal practically all of our former opinion is still applicable to the major questions now before us, and, because it was not published in the reports, we incorporate in this opinion the relevant parts of the same:

"Plaintiff's declaration consists of three counts. The first alleges, in substance, that Arthur G. McGay, the insured, on January 23, 1929, entered into an agreement with the defendant whereby for a valuable consideration given to defendant it agreed to issue to the insured three policies of insurance on his life, the policies to be payable, in case of the death of the insured, to his father, the plaintiff; that it was agreed that two of the policies should be delivered to the insured at that time and that the third policy should be in full force and effect from January 23, 1929, until March 28, 1929, at which time an additional premium was to be paid by said insured if he were living at that time, and that in the event that he should die before March 28, 1929, the policy should provide that $5,000 should be paid to the plaintiff upon proof of death; that the defendant failed and neglected to issue the third policy, and that Arthur G. McGay died on or about March 14, 1929. The count also contains the necessary allegations as to the performance of conditions, etc. The second count contains the allegations pleaded in the first count, and in addition alleges that the defendant failed and neglected to issue the third policy, but instead issued a policy payable to the plaintiff but not to take effect until March 28, 1929, and which contained provisions contrary to the agreement and was never delivered to Arthur G. McGay or the plaintiff, nor was it agreed to by either of the said parties. The third count, filed some time after the first and second, alleges that the deceased, on January 23, 1929, applied to the defendant for three $5,000 policies on his life, payable to plaintiff; 'that said application was contained in two certain letters (written by the insured) and on a printed form of an application furnished said Arthur G. McGay by the said defendant.' The count sets up the two letters, one addressed to the defendant and the other to Barney Newman, an agent of defendant. The letter to the defendant, dated January 23, 1929, is as follows:

"'I have just forwarded to Mr. B. Newman under separate cover an application of $15,000. and medical was made and sent from Chicago a few days ago.

"'Now here is how I want this handled. I have dividends accrued on my policies #3109,925-929 for the years 1928 and 1929 amounting in all to $111.15. I want policies issued in denominations of $5000. each. On one of them I wish to carry for a couple of months on an interim premium, the payment for same I forwarded on to Mr. Newman. This then leaves the two policies of $5000 each. Kindly transfer accrued dividends to the payment of this premium and the balance I also sent to Mr. Newman which he will take care of with you.

"'When policies are issued, have them forwarded to me at this address marked to my PERSONAL direction.

"'Very truly yours,

"'Arthur G. McGay.'

The letter to Newman, dated January 23, 1929, is as follows:

"'Dear Newman:

"'Confirming our telephone conversation of last night wherein we agreed that you would take $10.00 as your commission on this new policy and allow me the balance of your commission. I am therefore enclosing application blank completed, and writing the Equitable to transfer my accrued dividends to the credit of this policy and am enclosing a check to complete the Net payment.

"'This above arrangement is strictly confidential and purely between ourselves. For that reason I am addressing this letter to your personal attention. I believe that it will show up as follows:

"Plaintiff's declaration consists of three counts. The first alleges, in substance, that Arthur S. Mudge, the insured, on January 23, 1929, entered into an agreement with the defendant company for a fidelity insurance policy to defendant is agreed to issue to the insured there policies of insurance on his life, the policies to be payable, in case of the death of the insured, to his father, the plaintiff; that it was agreed that two of the policies should be delivered to the insured at that time and that the third policy should be in full force and effect from January 30, 1929, until March 30, 1929, at which time an additional premium was to be paid by said insured if he were living at that time, and that in the event that he should die before March 30, 1929, the policy should provide for payment of the policies to the plaintiff upon proof of death; that the defendant failed and neglected to issue the third policy, and that Arthur S. Mudge died on or about March 14, 1929. The count also contains the necessary allegations as to the performance of conditions, etc. The second count contains the allegations phrase in the first count, and in addition alleges that defendant failed and neglected to issue the third policy; but instead issued a policy payable to the plaintiff but not to the first month March 30, 1929, and which contained provisions materially to the detriment and not after following to insured. Mudge or the plaintiff, nor was it agreed to by either of the said parties. The third count, filed some time after the first and second, alleges that the deceased, on January 23, 1929, applied to the defendant for $5,000 policies on his life, payable to plaintiff, that said application was constructed in two certain letters (written by the insured) and on a printed form of an application (written with Arthur S. Mudge) by the said defendant. The count sets up the two letters, was addressed to the defendant and the other to Harry Newman, an agent of defendant. The letter to the defendant, dated January 23, 1929, is as follows:

"I have just forwarded to Mr. H. Newman under separate cover an application of $10,000, and medical was made and sent from Chicago a few days ago.

"Now here is how I want this handled. I have divided my policies on my policies $2000-$50 for the years 1928 and 1929 amounting in all to $111.12. I want policies issued in denominations of $5000 each. Do one of them I wish to carry for a couple of months on an interim premium, the payment for same I forwarded on to Mr. Newman. This then leaves the policies of $5000 each. Mutual treasurer received directions to the payment of this premium and the balance I also sent to Mr. Newman which he will take care of with you.

"When policies are issued, have them forwarded to me at this address marked to my PERSONAL direction.

"Very truly yours,

"Arthur S. Mudge."

The letter to Newman, dated January 23, 1929, is as follows:

"Dear Newman:

"Confirming our telephone conversation of last night, wherein we agreed that you would take $10,000 on your association on this new policy and allow me the balance at your usual rate.

I am therefore enclosing application blank complete, and waiting the opportunity to transfer my accrued dividends to the credit of this policy and on mailing a check to complete the first payment.

"This above arrangement is strictly confidential and purely between ourselves. For this reason I am addressing this letter to your personal attention. I believe that it will show up as claimed.

"'Premium on $10,000. policy issued
Jan. 13, 1929.....$259.80
50% Comms. turned over to
A. G. McGay.....$129.90
1928 Div. Pol. 3109925-929..... 74.15
1929 Div. Pol. 3109925-929..... 37.00
By check to Barney Newman..... 38.75 279.80

$ 20.00

"'Now I have decided to pay for $10,000. insurance as agreed and take out an additional $5000. on an interim premium of $10.00 which will carry it I believe about two months at which time I may be in a position to handle, but if not I can then let it drop. The remaining $10.00 is your commission as agreed.

"'Kindly see that the above is taken care of OK. sending me policies in care of the above but mark the envelope PERSONAL. Thanks Newman, for assisting me in this and rest assured, I will throw any business your way that I can.

"'With kindest regards, I am

"'Very truly yours,

"'Arthur G. McGay.'

The count then sets up the application of McGay which requested the defendant to 'issue in three policies of $5,000 each.' The count also alleges 'that a check for $38.75 was sent in said letter and was presented to said bank on which said check was drawn and paid by said bank; that defendant accepted said application and on February 13, 1929, notified in writing Arthur G. McGay * * * that said policies "on your life have been issued as applied for;" that at all times after April, 1917, the defendant has had a practice and custom, known to Arthur G. McGay, whereby the defendant issued the policies of life insurance to acceptable applicants giving the policy a registry date from, to-wit: not exceeding nine months subsequent to the date of the acceptance of the application for insurance, for the convenience of the insured in paying his premium; that in order to insure an applicant's life from the time of the acceptance of the application to the registry date of the policy, defendant gave to the applicant what is designated as "Preliminary Term Insurance," insuring the applicant's life between the time the application was accepted and the registry date of policy, on payment of the regular premium; that in order to have such preliminary Term Insurance the applicant was required to pay a premium for $5000. life insurance for such Preliminary Term Insurance (if 27 years old, which was the age of the applicant at the time in question, at the rate of, to-wit: $5.14 per thousand per month); that in pursuance of said custom and practice and in obedience to it * * * McGay paid $10.00 to defendant, which was accepted by it for the purpose of insuring * * * McGay's life in the sum of $5000. from the date of acceptance of said application, February 13, 1929; until, to-wit; two months thereafter, under the terms and conditions herein set forth and notified insured that the policy had been issued as applied for, and Arthur G. McGay's life became insured by the defendant in the sum of $5000, payable to plaintiff herein from the date of the acceptance of said application until a date long after the death of said assured; that defendant by its acts and conduct in the premises waived that part of the printed application wherein it was recited that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during the applicant's good health, and that no agent or other person, excepting the President, Vice-President, Secretary or Treasurer, or a Registrar of the defendant Society had power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or

"Plaintiff's declaration consists of three counts. The first alleges, in substance, that Arthur G. Bodey, the insured, on January 22, 1929, entered into an agreement with the defendant whereby for a valuable consideration given to defendant it agreed to issue to the insured three policies of insurance on his life, the policies to be payable, in case of the death of the insured, by his father, the plaintiff; that it was agreed that two of the policies should be delivered to the insured at that time and that the third policy should be in full force and effect from January 22, 1929, until March 22, 1929, at which time an additional premium was to be paid by the insured if he were living at that date, and that in the event that he should die before March 22, 1929, the policy should provide that $3,000 should be paid to the plaintiff upon proof of death; that the defendant failed and neglected to issue the third policy, and that Arthur G. Bodey died on or about March 14, 1929. The counts also contains the necessary allegations as to the performance of conditions, etc. The second count contains the allegations pleaded in the first count, and in addition alleges that the defendant failed and neglected to issue the third policy, but issued instead a policy payable to the plaintiff but not to take effect until March 22, 1929, and which contained provisions contrary to the agreement and was never delivered to Arthur G. Bodey or the plaintiff, nor was it agreed to by either of the said parties. The third count, filed some time after the first and second, alleges that the deceased, on January 22, 1929, applied to the defendant for three $3,000 policies on his life, payable to plaintiff; that such application was contained in two certain letters (written by the insured) and on a printed form of an application furnished by the defendant; and that the defendant, by its agent, accepted the said application and the other to Sidney Hansen, an agent of defendant. The letter to the defendant, dated January 22, 1929, is as follows:

"I have just forwarded to Mr. A. Hansen under separate an application of life ins. and medical was made and sent from Chicago a few days ago.

"The date is May I want this bondal. I have insured in my policies $3000-$2000 for the years 1926 and 1928 amounting in all to $11,15. I want policies issued in December at $3000, and, in one of them I wish to carry for a couple of months on an industrial premium, the payment for same I forwarded to Mr. Hansen. This then leaves the policies of $2000 each. Kindly transfer received dividends to the payment of this premium and the balance I also sent to Mr. Hansen which he will take care of with you.

"When policies are issued, have them forwarded to me at this address marked to my PERSONAL direction.

"Very truly yours,

"(signed) A. Bodey."

The letter to Hansen, dated January 22, 1929, is as follows:

"Dear Hansen:

"Confirming our telephone conversation of last night regards to speed that you could take $3000 on your consolidated on this new policy and allow me the balance of your commission. I am therefore enclosing application blank complete, and writing the Equitable to transfer my annual dividends to the payment of this policy and on enclosing a check to complete the first payment.

"This above arrangement is entirely unofficial and purely between ourselves. For that reason I am addressing this letter to your personal attention. I believe that it will show up as follows:

"'Premium on $10,000. policy issued
Jan. 13, 1929.....$259.80
50% Comms. turned over to
A. G. McGay.....$129.90
1928 Div. Pol. 3109925-929..... 74.15
1929 Div. Pol. 3109925-929..... 37.00
By check to Barney Newman..... 38.75 279.80

$ 20.00

"'Now I have decided to pay for $10,000. insurance as agreed and take out an additional $5000. on an interim premium of $10.00 which will carry it I believe about two months at which time I may be in a position to handle, but if not I can then let it drop. The remaining $10.00 is your commission as agreed.

"'Kindly see that the above is taken care of OK. sending me policies in care of the above but mark the envelope PERSONAL. Thanks Newman, for assisting me in this and rest assured, I will throw any business your way that I can.

"'With kindest regards, I am
"'Very truly yours,
"'Arthur G. McGay.'

The count then sets up the application of McGay which requested the defendant to 'issue in three policies of $5,000 each.' The count also alleges 'that a check for $38.75 was sent in said letter and was presented to said bank on which said check was drawn and paid by said bank; that defendant accepted said application and on February 13, 1929, notified in writing Arthur G. McGay * * * that said policies "on your life have been issued as applied for;" that at all times after April, 1917, the defendant has had a practice and custom, known to Arthur G. McGay, whereby the defendant issued the policies of life insurance to acceptable applicants giving the policy a registry date from, to-wit: not exceeding nine months subsequent to the date of the acceptance of the application for insurance, for the convenience of the insured in paying his premium; that in order to insure an applicant's life from the time of the acceptance of the application to the registry date of the policy, defendant gave to the applicant what is designated as "Preliminary Term Insurance," insuring the applicant's life between the time the application was accepted and the registry date of policy, on payment of the regular premium; that in order to have such preliminary Term Insurance the applicant was required to pay a premium for $5000. life insurance for such Preliminary Term Insurance (if 27 years old, which was the age of the applicant at the time in question, at the rate of, to-wit: $5.14 per thousand per month); that in pursuance of said custom and practice and in obedience to it * * * McGay paid $10.00 to defendant, which was accepted by it for the purpose of insuring * * * McGay's life in the sum of $5000. from the date of acceptance of said application, February 13, 1929; until, to-wit; two months thereafter, under the terms and conditions herein set forth and notified insured that the policy had been issued as applied for, and Arthur G. McGay's life became insured by the defendant in the sum of $5000, payable to plaintiff herein from the date of the acceptance of said application until a date long after the death of said assured; that defendant by its acts and conduct in the premises waived that part of the printed application wherein it was recited that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during the applicant's good health, and that no agent or other person, excepting the President, Vice-President, Secretary or Treasurer, or a Registrar of the defendant Society had power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or

"Premium on $10,000. policy issued
June 16, 1920.....$[illegible]
Net issue, Premium due 6
Jan. 6, 1921.....$[illegible]
Less 1st. Pol. [illegible].....$[illegible]
Less 2d. Pol. [illegible].....$[illegible]
By check to survey department.....$[illegible]

$[illegible]

"Now I have decided to pay for $10,000. insurance on
requested and take out an additional $5000. on an infantile premium
of $10.00 (these will early) if I believe about the middle of March
wise I may be in a position to handle, but it not I can then let
it drop. The remaining $5,000 in your association is sufficient.

"Kindly note that the above is taken care of Mr. Moody
on policies in case of the above but mark the envelope "Personal".
Thanks. Meanwhile, for assisting me in this and most respected, I will
close my business your may that I can.

"With kindest regards, I am

"Very truly yours,

"Arthur G. Moody."

The court then note up the application of Moody which requested the defendant to 'issue in force policies of $5,000 each.' The court also offers 'that a check for $24.75 was sent in said letter and was presented to said bank on which said check was drawn and paid by said bank; that defendant responded with application and on February 16, 1920, notified in writing Arthur G. Moody * * * that his policies "as your life have been issued as applied for" that at all times after April, 1919, the defendant has had a practice and custom, known to Arthur G. Moody, whereby the defendant issued the policies of life insurance to respondents applicants living the policy a registry date from, to-wit; not exceeding three months subsequent to the date of the acceptance of the application for insurance, for the convenience of the insured in paying his premium; that in order to insure an applicant's life from the time of the acceptance of the application to the registry date of the policy, defendant gave to the applicant what is designated as "Preliminary Term Insurance," insuring the applicant's life between the time the application was accepted and the registry date of policy, on payment of the regular premium; that in order to have such preliminary term insurance the applicant was required to pay a premium for $5000. Life insurance for such Preliminary Term Insurance (if 37 years old, which was the age of the applicant at the time in question, at the rate of, to-wit: $9.14 per thousand per month); that in pursuance of said custom and practice and in obedience to it * * * Moody paid $12.00 to defendant, which was accepted by it for the purpose of insuring * * * Moody's life in the sum of $5000. from the date of acceptance of said application, February 13, 1920; that, to-wit: the month thereafter, under the terms and conditions herein set forth and notified insured that the policy had been issued as applied for, and that Mr. Moody's life became insured by the defendant in the sum of $5000. payable to plaintiff herein from the date of the acceptance of said application, which date long after the death of said assured; that statements by his wife and counsel in the premises varied that part of the printed application showing it was stated that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during the applicant's good health, and that he found to be alive thereon, notwithstanding the "Pre-Medical Inspection" or Examiner, or a Physician of the defendant having had power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or

requirements, and that no waiver should be valid unless in writing and signed by one of the foregoing officers; avers that defendant paid to plaintiff two of the three policies of $5000. each which it had issued and delivered to the said assured, and issued the third policy of $5000. with a registry date of March 17, 1929, but did not deliver to assured the third $5000. policy, and failed to pay plaintiff the sum of $5000. for the Preliminary Term Insurance as it had agreed to do upon satisfactory proof of death of said assured.'

"The defendant filed a plea of the general issue to all three counts and an affidavit of merits, which avers 'that on, to-wit, January 23, 1929 said Arthur G. McGay applied for $15,000. worth of insurance on his life, payable to the plaintiff, to be issued in three policies of $5000. each; that said application was contained on a printed form of application furnished said McGay and was forwarded to one Barney Newman, an employe of the Detroit office of defendant, in the letter addressed to Newman dated January 23, 1929, set forth in said Third Count; that in and by said letter said applicant attempted to pay for two of the $5000. policies applied for by a rebating arrangement with Newman, whereby applicant took credit for the commissions which in due course would be payable to Newman on said $10,000 worth of insurance and by transferring dividends which were accruing on other insurance then in force on applicant's life with defendant, but said commissions were not available because applicant was in default in payments due on said other insurance; that in said letter applicant also suggested that the $10.00 therein enclosed should be a two months' interim premium on the remaining $5000. worth of insurance of the $15,000. worth applied for; that because of the complications resulting from the attempted rebating transaction and applicant's non-payment of amounts due on insurance theretofore issued, the rebating commission was not available to pay for the $10,000. worth of insurance until February 28, 1929; that on said date said $10,000 worth of insurance was paid for by said rebating arrangement; that no pre-term policy or term insurance policy was ever applied for by McGay or was ever issued by defendant; that no interim premium was ever paid by McGay, or accepted by defendant, but the $10.00 referred to in said letter of January 23, 1929 was returned to McGay and he was informed that the insurance which he had applied for which was to be issued in three policies of $5000. each had been issued, the third one of said policies, being dated two months ahead, to be held by defendant until the premium thereon was paid while the insured was still in good health, in accordance with the terms of said application; that said last $5000. policy was never taken out by McGay and was never delivered to McGay; that McGay never paid the premium thereon but died prior to the register date of said policy and prior to the date when said policy was to have been taken out in accordance with the arrangements between Newman and McGay; that said policy was therefore never in force and effect and no liability accrued by reason thereof; that in order to effect term insurance upon the life of an applicant, it is necessary that applicant apply for term insurance; that said application be accepted; that the term insurance premium be paid and that a policy be issued, by the terms of which said accepted applicant is insured for the term agreed upon and paid for by said applicant; that applicant never applied for term insurance; that applicant never paid for term insurance; that no term insurance was ever issued on the life of said applicant; that the $10. forwarded to defendant was never received by it, was never accepted by it and was never received nor accepted by it as a term insurance premium, and that defendant did not by any of its acts or conduct waive any part of its printed application nor in particular that part wherein it is recited that applicant agreed that any policy issued upon said

premium, and that no waiver should be valid unless in writing and signed by one of the foregoing officers; every time that defendant paid its liability arising on the three policies, at [illegible], each time it had issued and delivered to the insurance, and issued the same policy of [illegible], with a regularly dated of March 17, 1920, but did not deliver to assured the third [illegible] policy, and failed to pay plaintiff the sum of $[illegible], for the preliminary term insurance as it had agreed to do upon satisfactory proof of death of said assured.'

"The defendant filed a plea of the general issue to all three counts and an affidavit of merits, which avers 'that on, [illegible], January 21, 1919, said [illegible] applied for [illegible] of insurance on his life, payable to the plaintiff, to be issued in three policies of [illegible] each; that said application was accepted on a printed form of application furnished said Mabry and was forwarded to one Harvey Hanson, an employe of the Detroit office of defendant, in the Ilsley building in Jackson, dated January 21, 1919, and form in said Ilsley found; that in and by said Ilsley application attempted to pay for the [illegible]. Policies applied for by a separate arrangement with Hanson, whereby applicant took credit for the commissions which in due course would be payable to Hanson on a [illegible] month of insurance and by transferring dividends which were accruing on other insurance then in force on applicant's life with defendant; but said commissions were not available because applicant was in default in payments due on said other insurance; that said Ilsley application also suggested that the [illegible] insurance should be a two months' insurance premium on the remaining $[illegible] worth of insurance of the [illegible], which applied for; that because of the omission of the [illegible] or the omission of the omission, from the application of the omission, the rejected insurance and applicant's non-payment of amounts due on insurance therefore [illegible], the rejecting commission was not available to pay for the [illegible] worth of insurance until February 24, 1919; that on said date [illegible] worth of insurance was paid for by said rejecting arrangement; that no pre-term policy or term insurance policy was ever applied for by Mabry or was ever issued by defendant; that no insurance premium was ever paid by Mabry, or accepted by defendant, but the [illegible] referred to in said letter of January 24, 1919 was returned to Mabry and he informed that the insurance which he had applied for which was to be issued in three policies of [illegible], each had been issued, the third one of said policies, being dated two months ahead, to be held by defendant until the premium thereon was paid while the insurance was still in good health, in accordance with the terms of said application; that said June [illegible], policy was never taken out by applicant; that said June [illegible], policy was never delivered to Mabry; that Mabry never paid the premium thereon but died prior to the registered date of said policy and prior to the date when said policy was to have been taken out in accordance with the arrangement between Hanson and Mabry; that said policy was therefore never in force and effect and no liability accrued by reason thereof; that in order to effect term insurance upon the life of an applicant, it is necessary that applicant, apply for term insurance; that said application be accepted; that the term insurance premium be paid and that a policy be issued, by the terms of which said accepted applicant is insured for the term agreed upon and paid for by said applicant; that applicant never applied for term insurance; that applicant never paid for term insurance; that no term insurance was ever issued on the life of said applicant; that the [illegible] formerly defendant was never received by it, was never accepted by it and was never received nor accepted by it on a term insurance premium; and that defendant did not, by any of its agents, waive any part of the printed application nor in particular that part thereof in it provided that applicant agreed that any policy issued upon said

application should not take effect until the first premium had been paid to the defendant during applicant's good health and that no agent, etc., had power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or requirements and that no waiver should be valid unless in writing signed by certain designated officers.'

"The declaration admits that the two policies issued and delivered to the insured under the application of January 23, 1929, were paid in full by the insured. The instant suit was brought to recover on the so-called 'preliminary term insurance.' The theory of the plaintiff as to his claim is: That 'the assured applied for $5,000 insurance, the term of which was to begin in "about" two months. In the interim he asked to be covered by Preliminary Term Insurance, for which he paid $10.00. It developed that the $10.00 which the assured had sent only paid for fifty-two days of Preliminary Term Insurance. The date of the application was January 23, 1929, hence the regular term policy was dated March 17, 1929, exactly fifty-two days from the date of the application. On February 13, 1929, the defendant wrote the assured that, "The policies on your life have been issued as applied for." The contract on the insurance of $5000 in this case was then complete and binding. The Preliminary Term Insurance was in full force and effect for fifty-two days. The insured died within the fifty-two days.' The plaintiff further states: 'It is true that the term of that policy (referring to the one dated March 17, 1929, but not delivered) began on March 17th, but under the defendant's plan for Preliminary Term Insurance the assured was protected according to the terms of that policy between the date of the application and the register date of the term policy.' The defendant's theory is that 'defendant entered into no contract for the issuance of preliminary term insurance, and that its agent was not authorized to make any such agreement; that if any such agreement was made, since it was not contained in the policy it was prohibited by and void under the statute relating to life insurance policies; that a third policy was issued, but not delivered, with register date of March 17, 1929, upon which date it was to become effective if the premium were paid; that the $10 which was forwarded by the alleged insured to Newman was insufficient to pay for any preliminary term insurance, and was returned to McGay; that, therefore, there was no consideration for any preliminary term insurance, or for any contract to issue the same; and that no premium for any such insurance was ever paid.'

"No policy for preliminary term insurance was issued by the defendant. A third policy was prepared by the defendant and given a register date of March 17, 1929, but it was not delivered to the insured nor to the plaintiff, and no mention of preliminary term insurance is contained in that policy nor in the application for the three policies. Arthur G. McGay died March 14, 1929, three days prior to the register date of the third policy, and the plaintiff, of course, does not base his claim upon that policy. He admits that 'the term of that policy began on March 17th,' but he contends that under the alleged preliminary term insurance and the defendant's plan in reference to such insurance the assured was protected, according to the terms of the policy dated March 17, between the date of the application and March 17.

"The defendant has assigned and argued a number of points, but in the view that we have taken of this appeal we shall refer to only three. The defendant contends that there was no evidence tending to prove any contract for preliminary term insurance and that the trial court erred in refusing to direct a verdict for the defendant. This

[illegible] should not take effect until the first premium had been paid to the defendant company; [illegible] health and that [illegible] equal, etc., had power to make or modify any contract or behalf of the Society or to waive any of the Society's rights or privileges and that no waiver should be valid unless in writing signed by certain authorized officers.'

"The defendant admits that the two policies issued and delivered to the insured under the application of January 20, 1920, were paid in full by the insured. The insured [illegible] premiums on the so-called 'preliminary term insurance.' The theory of the plaintiff is, to its claim [illegible] that this amount applied for $5,000 insurance, the term of which was to begin on "about" two months. It the intention to make it or received by preliminary term insurance, for which he paid $[illegible]. It developed that the $10,000 which the assured had sought only paid for [illegible] of preliminary term insurance. The note of the medical [illegible] the company as, [illegible] issued the regular term policy, dated March 17, 1920, exactly [illegible] days from the date of the application. On February 20, 1920, the effective date [illegible] the amount of $[illegible], [illegible] on the insurance [illegible] 'If it is true that the terms of these policy (referring to the [illegible] dated March 17, 1920, but not delivered on March 17, [illegible] the defendant's plan for preliminary term insurance the [illegible] was produced according to the terms of that policy between the [illegible] of the application and the regular policy of the term policy.' The defendant's theory is that 'attempts entered into to contract for the insurance of preliminary term insurance, and that its agent [illegible] authorized to make any such agreement; that if any such [illegible] was made, since it was not contained in the policy it was [illegible] by and said under the statute relating to life insurance [illegible] that a third policy was issued, but not delivered, with [illegible] date of March 17, 1920, upon which date it was to become effective if the premium were paid; that the $[illegible] which was issued [illegible] the signed insured to [illegible] the additional to pay for any preliminary term insurance, and was returned to Society; that, therefore, there was no consideration for any preliminary term insurance, or for any contract to issue the same; and that no premium for the [illegible] insurance was ever paid.'

"No policy for preliminary term insurance was issued by the defendant. A third policy was prepared by the defendant, and given a register date of March 17, 1920, but it was not delivered to the insured nor to the plaintiff, and no mention of preliminary term insurance is contained in that policy nor in the application for the three policies. Prior to March 17, 1920, the insured died, and a controversy prior to the register date of the issued policy, and a controversy of course, does not take its origin upon that policy.

"The date of that policy began on March 17, but it contained that under the alleged preliminary term insurance and the defendant's plea in reference to such insurance the insured was protected, supposing the terms of the policy dated March 17, between the date of the application and March 17.

"The statement has analyzed and argued a number of points, but in the view that we have taken of the legal [illegible] it will tend to only serve. The defendant contends that [illegible] no evidence tending to prove any contract for preliminary term insurance and that the trial court erred in refusing to direct a verdict for the defendant. This

contention, strenuously argued, is not without some force, but we have concluded that we would not be justified in sustaining it. However, we have reached the conclusion, after a painstaking examination of all the evidence, that the verdict of the jury, which necessarily must have been based upon a finding that the defendant contracted with the insured for preliminary term insurance, is clearly against the manifest weight of the evidence. As this case may be tried again we purposely refrain from analysing and commenting upon the evidence that bears upon that vital question.

"* * * Second, the defendant complains that the court erred in refusing to give the following instruction offered by it: 'The Court instructs the jury as a matter of law that the defendant's representative, Barney Newman, had no authority to bind defendant, Insurance Company, to any contract of or for insurance.' We think, under the pleadings in this case and the evidence, this contention is a meritorious one. The application signed by the insured expressly states that 'no agent * * * has power to make * * * any contract on behalf of the Society.' The plaintiff, in count three, alleges 'that defendant, by its acts as herein set out and conduct in the premises, waived that part of the printed application wherein it was recited that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during applicant's good health, and that no agent or other person excepting the president, vice president, secretary, or treasurer, or a registrar of defendant had power to make or modify any contract on behalf of defendant or to waive any of defendant's rights or requirements, and that no waiver should be valid unless in writing and signed by one of the foregoing officers.' The third count also alleges 'that Arthur G. McGay and plaintiff kept, performed, and complied with all the terms, provisions, and agreements, entered into between McGay and defendant; that defendant then and there became liable to pay plaintiff the sum of $5,000, together with interest at five per cent per annum from the time proofs of death were furnished to defendant.' There is much force in the contention of the defendant that under the particular facts of this case the instruction in question should have been given. The insured had been an employee of the defendant company in its office for about two years and it might reasonably be presumed that he had some knowledge of the limitations imposed by the defendant upon the authority of soliciting agents. He and Newman were friends and the correspondence between them was more or less confidential and personal in character. The plaintiff, in his brief, argues that the defendant took advantage of and ratified everything Newman had done. But this argument does not answer the contention that under the evidence Newman 'had no authority to bind defendant * * * to any contract of or for insurance.' It seems clear to us that the instruction should have been given."

Plaintiff argues that under the ruling in Niemann v. Security Benefit Ass'n, 350 Ill. 308, 316, decided since our former decision, "Barney Newman was the general agent of the defendant company with authority to bind the company," and that therefore our former holding that he had no authority to bind the defendant to any contract for insurance is no longer the law of the case. The Niemann case follows Hancock Life Ins. Co. v. Schlink, 175 Ill. 284, which was relied upon

contention, unanimously argued, is not without some force, but we have concluded that we would not be justified in sustaining it. Moreover, we have reached the conclusion, after a painstaking examination of all the evidence, that in general at the jury, which consequently must have been based upon a finding that the defendant contracted with the insured for preliminary term insurance, is clearly against the manifest weight of the evidence. As this case may be tried again we express no purposely refrain from analyzing and commenting upon the evidence that bears upon that vital question.

"* * * Second, the defendant complains that the court erred in refusing to give the following instruction offered by it: 'The court instructs the jury as a matter of law that the defendant's representative, Barney Kennan, had no authority to bind defendant, Insurance Company, in any contract of or for insurance.' In this, under the pleadings in this case and the evidence, this contention is meritorious. The application signed by the insured unequivocally states that 'no agent * * * has power to make * * * any contract on behalf of the Society.' The plaintiff, in case 'three', alleges 'that defendant, by its acts as herein set out and conduct in the premises, waived that part of the printed application wherein it was provided that the applicant agreed that the policy or policies issued upon said application should not take effect until the first premium had been paid to the defendant during applicant's good health, and that no agent or other person soliciting the provisions, vice president, secretary, or treasurer, or a registrar or internist had power to make or modify any contracts on behalf of defendant or to waive any of defendant's rights or requirements, and that he relied upon the validity thereof in writing and signed by one of the foregoing officers.' The jury found also allegen 'that further S. Bedey and plaintiff kept, performed and complied with all the terms, provisions, and stipulations, required into behalf of defendant' that defendant knew that Kennan was liable to pay plaintiff the sum of $5,000, whether with insurance or not, per year, from the time the policy of such was issued to defendant.' There is much force in the contention of the defendant that under the particular facts of this case the instruction in question should have been given. The insured had been an employee of the defendant company in its office for about two years and it might reasonably be presumed that he had some knowledge of the limitations imposed by the defendant upon the authority of soliciting agents. He and Kennan were friends and the correspondence between them was more or less confidential and personal in character. The plaintiff, in his brief, argues that the defendant took advantage of the fraudulent practicing Kennan had done. But this argument does not answer the contention that under the evidence Kennan 'had no authority to bind defendant * * * in any contract of or for insurance.' It seems plain to us that the instruction should have been given."

Plaintiff argues that under the ruling in Kiernan v. Security Benefit Ass'n, 325 Ill. 308, 316, decided since our former decision, "Barney Kennan was the general agent of the defendant company with authority to bind the company," and that therefore our former holding that he had no authority to bind the defendant to any contract for insurance is no longer the law of the case. The Kiernan case follows Security Life Ins. Co. v. Hamilton, 172 Ill. 544, which was called upon

by plaintiff on the former appeal. The agent in the Niemann case was the district manager of the defendant therein, a mutual benefit association. The Hancock case dealt with the powers of a "general agent," who was "advertised as general agent of the company. He acted for and in behalf of the company. The company accepted his acts and forwarded policies to him to be delivered in pursuance of contracts made by him." It will be noted that the Niemann and Hancock cases involve the question of the waiving of conditions rather than the question of the making of contracts. There is, of course, a distinction between a general agent and a special agent as applied to insurance contracts. A general agent is one who is authorized to bind the insurance company to contracts. (See Continental Ins. Co. v. Ruckman, 127 Ill. 364, 372.)

"A soliciting agent is merely a special agent, and as a general rule, has authority only to solicit insurance, submit applications therefor to the company, and perform such acts as are incident to that power. He may bind the company by agreements and representations properly made in connection with the application for insurance, but ordinarily has no authority to bind it by attempted acts or contracts in its behalf, relating not to the taking of the application, but to the subsequent contract of insurance, or to other matters not connected with the application and not within the real or apparent scope of his authority, such as the appointment of other agents." (32 C. J. 1067-8.)

We adhere to the conclusion we reached in our former opinion that under the evidence Newman was merely a soliciting agent, or special agent, and that he had no authority to bind defendant to any contract for insurance. Plaintiff again contends that because defendant allowed Newman to use a company letterhead upon which appeared the words, "Barney Newman, Representative," it thereby held him out to the public as a general agent. We are still unable to agree with this contention. Any salesman or solicitor is a representative of his company, but for a special purpose. A general agent is also a representative of his company, but all the representatives of the company are not general agents. Newman worked in the Detroit office of defendant, and the insured worked for defendant for two years in the cashier's

by plaintiff on his former appeal. The case is the Kinnear case
and the district manager of the defendant insurance, a mutual benefit
association. The Kinnear case dealt with the powers of a "general
agent," who was "advertised as general agent of the company. He
acted for and in behalf of the company. The company displayed his
name and furnished policies to him to be delivered to persons or
companies duly by him." It will be noted that the Kinnear and Dorsey
cases involve the question of the waiving of conditions rather than
the question of the making of contracts. There is, of course, a dis-
tinction between a general agent and a special agent as applied to in-
surance contracts. A general agent is one who is interested in bind
the insurance company to contracts. (See Cartwright Ins. Co. v.
Hoffman, 147 Ill. 304, 372.)

"A solicitation agent is merely a special agent, not as a general rule, the authority only to obtain insurance, submit applications therefor to the company, and perform such acts as are incident to that power. It may bind the company by oral or written representations strictly made in connection with the application for insurance, but ordinarily has no authority to bind it by allowing or omitting to do something in the behalf, relating one to the taking of the application, but is the subsequent authority of insurance, or to other matters not connected with the application and not within the real or apparent scope of his authority, such as the appointment of other agents." (22 C. J. 1507-8.)

To adhere to the conclusion we reached in our former opinion that under the evidence Dawson was merely a soliciting agent, or special agent, and that he had no authority to bind defendant to any contract for insurance. Plaintiff again contends that because defendant claimed Dawson to be a company lecturer upon which appeared the words, "Dawson Dawson, Representative," is thereby held him out to the public as a general agent. We are still unable to agree with this contention. Any salesman or solicitor is a representative of his company, but for a special purpose. A general agent is also a representative of his company, but all the representatives of the company are not general agents. Dawson worked in the Detroit office of defendant, and the insured worked for defendant for two years in the auditor's

department in the same office and all applications for insurance went through that department. As stated in our former opinion, it must be presumed that he had some knowledge of the limitations imposed by defendant upon the authority of soliciting agents. We adhere to our former conclusion that the correspondence between the insured and Newman shows that they were friends, and that the letters between them were of a confidential character. Indeed, the insured, in a letter to Newman dated January 23, 1929, stated that the arrangement between them respecting the proposed insurance was "strictly confidential and purely between ourselves." Newman was attempting to aid his old friend to secure the proposed insurance, and he was willing to allow the latter to use part of his commission in payment of the proposed insurance. In view of the correspondence and other testimony, we think plaintiff's criticism of Newman and his testimony is unwarranted. Nor can the good faith of defendant, in defending the instant case, be justly questioned. As we stated in our former opinion, defendant promptly paid to plaintiff a number of policies issued to the insured, although two of them were in force only sixteen days at the time of the death of the insured.

Defendant contends that as there was no evidence introduced upon the second trial to make plaintiff's case any stronger than it was at the first trial, our former ruling that the verdict and judgment were clearly against the manifest weight of the evidence is the law of the case and we are now bound by it. We cannot agree with this contention. (See Morkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1. Certiorari denied by the Supreme court.)

Defendant contends that even if we are not bound by our former ruling, nevertheless, the verdict and judgment upon the second trial are clearly contrary to and against the manifest weight of the evidence. In our former opinion we stated: "We have reached the conclusion, after a painstaking examination of all the evidence, that the verdict of the

department in the home office and all applications for insurance went through that department. As stated in our former opinion, it must be presumed that he had some knowledge of the limitations imposed by directors upon the authority of soliciting agents. In addition to our formal conclusion that no misrepresentations between the insured and themselves, where that they were strangers, and that the letters between them were of a confidential character. Insured, Mr. Imsland, in a letter to Herman dated January 22, 1930, stated that the arrangement between them involving the proposed insurance was "strictly confidential and purely between ourselves." Herman was disengaged to not but not failed to secure the proposed insurance, and he was willing to allow the letter in his part of his consideration in payment of the premium insurance. In view of the circumstances our opinion that plaintiff's criticism of Herman and his testimony is unwarranted. Nor can he gain views of witnesses, in determining the ultimate case, to justify insistence. As is stated in our former opinion, informed strongly that in plaintiff's behalf of judicial insured to the insured, although who of them was in fact only acquainted at the time of the death of the insured.

Defendant contends that is there was no evidence introduced upon the second trial to make plaintiff's case by strongest than it was at the first trial, and further relied that the verdict and judgment were clearly against the manifest weight of the evidence in the instant case and we are now bound by it. We proceed upon with this contention. See Illinois 7- [illegible] 7, In. The, the III. App. 1. Certainly denied by the Supreme Court.)

Defendant contends that even if we are now bound by our former ruling, nevertheless, the verdict and judgment upon the second trial are clearly contrary to and against the manifest weight of the evidence. In our former opinion we stated: "We have varied the conclusion, after a painstaking examination of all the evidence, that the verdict of the

jury, which necessarily must have been based upon a finding that the defendant contracted with the insured for preliminary term insurance, is clearly against the manifest weight of the evidence." Because of the fact that two juries have found for plaintiff, we have again very carefully considered all of the evidence bearing upon the question as to whether defendant contracted with the insured for preliminary term insurance, and have reached the conclusion that the instant contention of defendant must be sustained.

Defendant again strenuously contends that there is no evidence tending to prove a contract for preliminary term insurance and that therefore the trial court erred in refusing to direct a verdict for defendant. We repeat what we said in our former opinion, that while the contention is not without some force, we do not believe that we would be justified in sustaining it.

Certain other contentions are raised by defendant in support of its general argument that the judgment should be reversed, but we do not deem it necessary to consider the same.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan and Friend, JJ., concur.

Hall, which accordingly was then based upon a finding that the defendant contributed with the issuing the preliminary injunction.

In clearly against the manifest weight of the evidence." Because of the fact that two juries have found for plaintiff, we have again very carefully considered all of the evidence bearing upon the question as to whether defendant contributed with the issuing the preliminary injunction, and have reached the conclusion that the damages recovered of defendant were be sustained.

Defendant again strenuously contends that there is no evidence showing is prove a conspiracy to prolongedly have injunction and that therefore the trial court erred in refusing to direct a verdict for defendant. We repeat what we said in our former opinion, that while the preponderation is not without some force, we do not believe that we would be justified in sustaining it.

Certain other contentions are raised by defendant in support of his general argument that judgment should be reversed, but we do not deem it necessary to discuss the same.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded.

PRESIDING JUSTICE CRAVEN.

SULLIVAN and McGINN, JJ., concur.

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38240

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

BERNARD F. MALA,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

283 I.A. 642

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The amended information charged defendant with violating par. 25, sec. 24, ch. 91, Medicine and Surgery Act, 1933. Defendant plead not guilty and waived a jury trial. The court found defendant guilty in manner and form as charged in the information and sentenced him to six months in the House of Correction. Defendant sued out a writ of error to the Supreme court from the judgment entered in the cause, contending that Section 24 violates Article II, Section 10, of the Constitution of the State of Illinois and Article V of the Constitution of the United States. The Supreme court found that the case was wrongfully appealed to that court and transferred it to this court.

Section 24 reads as follows:

"Par. 25. Unlawful holding out, diagnosis or treatment.) Sec. 24. If any person shall hold himself out to the public as being engaged in the diagnosis or treatment of ailments of human beings; or shall suggest, recommend or prescribe any form of treatment for the palliation, relief or cure of any physical or mental ailment of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; or shall diagnosticate or attempt to diagnosticate, operate upon, profess to heal, prescribe for, or otherwise treat any ailment, or supposed ailment, of another; or shall maintain an office for examination or treatment of persons afflicted, or alleged or supposed to be afflicted, by any ailment; or shall attach the title Doctor, Physician, Surgeon, M. D., or any other word or abbreviation to his name, indicative that he is engaged in the treatment of human ailments as a business; and shall not

then possess in full force and virtue a valid license issued by the authority of this State to practice the treatment of human ailments in any manner, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by confinement in the county jail not more than one year, or by both such fine and imprisonment, in the discretion of the court."

Defendant had an office in the basement of his residence. He introduced a certificate from the "American College of Mechano-Therapy" which certifies that he had completed a "Practical and Clinical Course in Mechano-Therapy" and recommends him "to members of the medical profession, and all others in need of manipulative methods of healing." He also introduced a certificate from the Commissioner of Patents of the United States of America which certifies that the records of the patent office show that E. P. Mann & Co., on April 5, 1917, had filed in that office an application for registration of a certain "Trade-Mark for Remedy and Ointment for Certain Named Diseases and Affections," and that on August 14, 1917, the said trade-mark was duly registered in that office.

It is conceded that the prosecuting witness, Joe Hagan, called at the office of defendant on November 25, 1934, accompanied by his cousin, Walter Hagan. Dr. Seiont had attended the prosecuting witness as a physician for some time prior to November 25. The latter testified that two days before November 25 he examined Joe Hagan and at that time he "was suffering from obstruction in the intestinal tract somewhere. * * * He was short breathed and he couldn't breathe. He had an extended abdomen. I felt the mass, the palpable mass just below the umbilicus on the right hand side and then on the other a little left of the umbilicus. He was jaundiced, yellow; he couldn't breathe and couldn't urinate; violent pain in the abdomen and he couldn't eat." From the doctor's testimony it is evident that he diagnosed the case as carcinoma and he suggested that an X-ray picture be taken of the entire intestinal tract. The doctor saw him again on November 27. "His condition

was worse - more pain, more vomitting, short breath. * * * There were marks - black and blue marks on the back * * * caused by glass cups. They used them a good deal in Europe - in western Europe. There is a system of cupping and it is used for every and all kinds of ailments - a regular panacea * * * they apply the cups by heating in hot water and they rub in alcohol to form a vacuum in the cups - they apply them out waiting for cooling;" the application of the cups "draws the flesh." The doctor then communicated with the American Medical Association and with a representative of the Department of Education and Registration in reference to defendant's treatment of the prosecuting witness. The evidence shows that on the day the prosecuting witness called upon defendant he was too weak to walk and that his cousin took him to defendant's office in an automobile. The prosecuting witness testified, in substance, that he found defendant in his office, "a basement office in there, and a desk and a chair;" there was a table "like a doctor's table;" there were sun-ray lamps in the place and electrical equipment for massage treatment; that when he entered the office defendant looked at him and said, "You are sick;" "He said I got Dropsy, and he said he would cure me, and he said if I go to a medical man then I would have to arrange with the undertakers. * * * He say that he going to cure me." The witness further testified that he stripped to the waist and lay on the table and that defendant rubbed him with something and used the massage machine; that while he was lying on his stomach the doctor applied vacuum cups to his back for about four or five minutes, then wiped the witness, and said that he would be all right; that defendant then gave him medicine and told him to take it; that after the cups were removed he was rubbed with salve; that nineteen cups were placed on his back. The witness, after identifying several bottles, also a box of salve that defendant had given him, further testified that defendant told him to use the medicine and "come back when it is gone and

get some more;" that he gave defendant five dollars; that he had seen Dr. Swiont before and after the time he called on defendant; that after the call he saw marks on his back "the size of the cups" and in the same places as the cups were placed upon his back. Upon cross-examination the witness stated that he was very weak prior to the call, "so sick I could not ride in the street car;" that when he walked into defendant's office the latter said to him, "You get Dropsy;" that defendant gave him two bottles of medicine and the salve; that defendant gave him a massage and "a sun or rays treatment;" that he saw no sign on the door "indicating a medical doctor or physician;" that defendant "said he was going to cure me." The witness further stated that he was forty-four years of age, was born in Poland and went to school "a little;" that he was a farmer before he came to Chicago.

Walter Ragan, a cousin of the prosecuting witness, testified that he took the latter to defendant's place; that the office had a desk and a table, "a few chairs, an office desk, and there was a medicine cabinet or something up against the wall; * * * there were electric lights in the basement and an electric heat lamp above the table where that man Joe Ragan had to undress himself to the waist, and he was getting a treatment down there * * * and Joe Ragan got an electric treatment;" that defendant "said that Joe Ragan had pleurisy * * * water under the skin. Q. What were his words? A. He said he had pleurisy and he said he could cure him. * * * Mana said he would cure Joe and if he would leave it up to him he would cure him - only if he would go down to see a medical doctor he would puncture him and draw water out of him and it would be better to see an undertaker first - those were the very words;" that after defendant applied the vacuum cups on the prosecuting witness he rubbed him with some liquid; that the prosecuting witness was undressed up to his waistline; that defendant massaged the prosecuting witness with his hands; "the cups

was applied by heating them - when he got them heated he would wipe them off with alcohol and flash a little flame in it and he would slap it right on his back so the vacuum would start pulling;" the cups were "roughly, one and three-quarters of an inch in diameter;" that as soon as the prosecuting witness took off his clothes and lay on the table defendant "tapped him with his finger all the way around - up in the front;" that after the prosecuting witness got on his clothes defendant told him that he would cure him; that after the prosecuting witness paid defendant five dollars defendant gave him the medicine. Upon cross-examination the witness stated that when the prosecuting witness entered the office he "said he wasn't feeling well - he was sick. * * * Mana looked at him and he said he had pleurisy. * * * He told him to drop his clothes down to the waistline and he took him over to another corner of the basement on that table of his - told him to lay down and then he tapped him with his fingers. * * * He heated him with that electric-lamp and then he gave him this salve rub and then he gave him the cups - vacuum cups;" that defendant "repeated a few times that he will cure him; * * * if he would go to a medical doctor he would be punctured - it would be better before if he would go down and see an undertaker;" that part of the conversation was Polish and part was in English. Upon redirect the witness stated that defendant told the prosecuting witness that the latter had pleurisy.

Defendant was the sole witness in his own behalf. He testified that for twenty years he had been in the "business of massaging;" that he had a massaging table, "and workings and a vibrator that belongs to the massaging, and that is all I got;" that "I use massaging and a vibrator and an electric lamp," and salve in connection with the massaging; that he mixes the salve and makes the liquid medicine. "Mr. Chenes (attorney for defendant): Now, do you know what the liquid contents of the mixture is? (Showing the witness one of the

will appeal to Dorothy Shaw - when he put that forward he could wipe them off with disdain and leave a little flaw in it are he could only it right on his back as the wagon would still glitter." The wife was "wonderful, one and inter-marries of so long in Glamour," like as even on the prosecuting witness box off his shoulder and lay on the table entwined "hugged him and it takes all the way around - up to the front;" then after the prosecuting attorney got on his clothes fainting; told him that he would have that after the prosecution witness paid informing five dollars informed were him the multiple. Upon cross-examination the witness stated that when the prosecuting attorney entered the office he "said he wasn't feeling well - he was sick. * * * Some London of him and he said he was glaucoma. * * * He said she is trap his clothes have in the courtline and he lost his over he another point of the Brownsville at the - said that is far down and then he taper the with his fingers. * * * He looked his right that distrib-Jerry and then he gave his white rub and then he gave him the eyes - woman rugs" that informant "figured a for issue that he will use like * * * if he wants go to a matched tutor he would be planted - it would be better if he would go down and see he Wednesday" but part of the conversation was talk and part was in English. Upon examined the witness stated that informant told the prosecuting witness that the Jerry had glaucoma.

Mahoney was the sole witness in his own behalf. He testified that for twenty years he had been in the "business of managing" that he had a managing table, "was managing and a vibrator this be-longs in the management, and that is all I do;" that "I was managing and a vibrator and on electric lamp," and mains in connection with the management that he makes the walls and makes the light smaller. "Mr. Thomas informing for information? Now, as you know what the legal meaning of the mistake is? (Showing the witness one of the

bottles given the prosecuting witness.) A. Yes. * * * Cough syrup, seventy-five gallons - and I use eight dozen of eggs and thirty-five pounds of rock-candy - pure rock-candy;" that the salve contains resin, "petroleum jelly and some other stuff - oil. Q. Have you in your office and in the basement any other medicine excepting ~~the~~ salve? A. I get more. Q. Have you any other medicine? * * * A. Stomach remedy." The witness then testifies that he gave the prosecuting witness a massage treatment; "I give massage with my hands and with my vibrator under an electric lamp; then I give him medicine - my own medicine it was. * * * And something else, the salve. * * * Q. Did you tell him he got Dropsy? A. I never examined, I know nothing, I am not a physician. Q. Did you tell him he had pleurisy? A. I never told him. Q. Did you say to him that you would cure him? A. I never said that. Q. What did you say then? A. I said if he go on my prescription, what I told him, that his wife shall give him every evening - bring in circulation, he is going to get relief, that is all I told him. Q. You did not tell him you would cure him? A. No." The witness then testified that he used the vacuum cups upon the prosecuting witness, because "it brings the blood to circulation." Upon cross-examination the following occurred: "Q. What is your business, Mr. Wazz? A. Masseur. Q. Is that strictly your business, Masseur? A. I sell my medicine besides being a Masseur. Q. You just stated you were going to give him some relief - from what, Mr. Wazz? A. From the pain that he has. Q. Where did he say he has the pain? A. Abdomen. * * * Q. You say this medicine you gave him was for a cough? Isn't that what you stated A. That is a stomach remedy and cough medicine. Q. What did you give it to him for, cough or stomach? Q. I gave it to him for blood circulation. * * * Q. You say it is a stomach remedy and cough medicine - all right, did he have a cough? A. No, I never heard him cough. Q. He complained of pains in his stomach to you?

A. He complained me. Q. And you gave him this medicine? A. Yes. Q. And you sold it to him? A. He asked me for the medicine. Q. What happened to the salve, what is that for? A. For using the hands. Q. What is it supposed to do? A. Bring the blood in circulation. * * * Q. Mr. Maza, when Joe came into your place he made some complaint to you that he wasn't feeling well? A. Yes. Q. You gave him a treatment? A. Yes. * * * Q. You did prescribe that medicine? A. I never prescribed it. Q. You gave it to him? A. Yes. Mr. Cooney (attorney for defendant): I object. The Court: Sustained. Mr. Connery (attorney for plaintiff): Q. And you sold it to him for Five Dollars? A. Yes, sir. Q. Now, Mr. Maza, as a matter of fact, you made a living for the last twenty years, haven't you, by selling this medicine and salve? A. And the massaging. Q. And by massaging, also is that correct? A. Yes, sir. * * * The Court: Q. This bottle, Plaintiff's exhibit one, this bottle here (indicating) what does it contain? A. This is sassafras and red olive and ginger root powder and water. The Court: Q. What is that supposed to relieve? A. Bring the blood to circulation. Q. This bottle, Plaintiff's exhibit one, was contained in this paper carton, was it? A. No. Q. What was in the paper carton? A. Stomach remedy. * * * Mr. Connery: Open it and look at it if you want. (Mr. Maza opens box) A. Yes, sir. Q. This was the medicine you gave him internally on that day - is that the medicine you gave him on that day? A. I give him two bottles, and that would be three bottles already. Q. Is this the medicine you gave him on that day? The Court: You say he has got two bottles? Mr. Connery: Q. Is this the medicine you gave him on that day? A. I gave him two bottles. All right, that is mine. Q. How did you determine on that day that Joe came in there, November 28, 1934, that he had poor blood circulation? A. He come to me with that story. Q. What story? A. He said, 'Mr. Maza I am ruined, - do you think that you should

A. He mentioned me. Q. And you gave him some medicine? A. Yes.
Q. And you told it to him? A. He asked me for the medicine. Q.
That happened to the male, that is that?? A. The young man
Mendo. Q. That is it mentioned in my? A. Using the blood in
circulation. ? ? Q. Mr. Mendo, when the court this year gave he
made some complaint to you that he -- it's during well? A. Yes.
Q. You gave him a treatment? A. Yes. ? ? A. You did prescribe
that medicine? A. I never prescribed it. Q. You gave it to him?
A. Yes. Mr. Conway (attorney for defendant): I object. The Court:
Sustained. Mr. Conway (attorney for plaintiff): Q. And you made
it as his for five dollars? A. Yes, sir. Q. Now Dr. Mendo, as a
matter of fact, you made a living for the last 4-month period, haven't
you, by selling this medicine and salve? A. And the massaging. Q.
And by massaging, also is that correct? A. Yes, sir. ? ? The
Court: Q. This health "Daniel's" medicine man, who having here
(indicating) what does by counsel? A. This is mosquito and the
skin and finger and penis and mouth. The Court: Q. Who is that
mentioned to client? A. Using the blood to circulation. Q. This
medicine, Daniel's health one, was mentioned in this paper action,
was it? A. No. Q. Then you in the paper action? A. Common
penis. ? ? Mr. Conway: Does it and back at it if you mean,
(Mr. Mendo shows box) A. Yes, sir. Q. This was the medicine you
gave him personally on that day - is that the medicine you gave him
on that day? A. I give him the medicine, the same medicine on that
medicine already. Q. In this the medicine you gave him on that day?
The Court: You may in box for the medicine? Mr. Conway: A. Of
that the medicine you gave him on that day? A. I gave the
medicine. All right, that is mine. Q. Now did you prescribe or that
day that you come in there, December 28, 1956, that he not gave blood
circulation? A. He come to me with that disease. Q. That always
gave him medicine? A. Yes, sir. Q. Now Dr. Mendo, you -- as you think that you should

cure me of this sickness?' * * * Q. Did you ever study medicine? A. No. Q. Do you know the symptoms for poor blood circulation? A. Yes. * * * Q. What are the symptoms? A. That is not in my line of business. * * * Q. What did you massage him for? A. To give him relief. Q. Relief from what? A. From a swelled up condition that he was in. Q. Swelled up condition was there - what was swelled up on him? A. Abdomen. Q. You didn't give him a massage for his blood circulation? A. Yes, for the blood circulation. Q. You say his stomach was swelled up? A. Not stomach, abdomen. * * * Q. Do you know if he had a swelled stomach, a swelled stomach on that day? Why did you give him a massage? A. To give him relief from swelled up. The Court: Q. Where was he swellen? A. All over in the abdomen. Mr. Connery: Q. As a matter of fact you didn't know whether that would give relief or increase the pain? A. I guess that gave him relief. Q. No guessing, do you know? A. I never can say yes for sure; I get thousands of people. * * * Mr. Cowan (attorney for plaintiff): Q. When he came to you, Mr. Buza, did he say he was in pain? A. He told me. Q. He complained of pain, didn't he? A. Yes." The witness denied that he told the prosecuting witness that he had dropsy, pleurisy or "water on the belly." At the close of all the evidence the court stated that there was a clear case against defendant, and thereupon counsel for defendant requested to be heard, "on the ground the Section 24 is unconstitutional."

Defendant contends that massaging and using electric vibrators and electric lamps upon the human body does not constitute a violation of the Medical Practice Act of this state. It may be conceded that such treatments, standing alone, would not constitute a violation of that act. Defendant further contends that under his trade-mark he had a right to sell his patent medicines and the sale of patent medicines is not treating human ailments within the provisions of Section 24. It may also be conceded that the mere selling of patent medicines is not a

[illegible] no of this eloquence? * * *. Q. Did you ever study medicine?
A. No. Q. Do you make the statement for your about [illegible]?
A. Yes. * * *. Q. Have you the Dispensary? A. Yes. Q. Is not its up
time of business. * * *. Q. Then did you measure the [illegible]? A. No
with the wall?. A. Behind from where? A. From a medium of [illegible]
time that he was in. Q. Behind my medicine via [illegible] - that was
medicine up on later? A. Sometimes. Q. You didn't give him a message
for his blood circulation? A. Yes, for the blood circulation. Q. The
map his element the medical map? A. Not chemical, elements. * * *. Q.
Do you know if he had a medical chemist, a medical chemist on that map?
Why did you give him a message? A. To give the patient from medical ex-
The chemist? Q. There was no medicine? A. It was in his business.
Dr. Hackney? Q. As a matter of fact you didn't have chemist that would
give relief or increase the pulse? A. I guess that gave the relief. Q.
Do guessing, do you know? A. I never did any for the [illegible] I get
[illegible] of people. * * *. Dr. Dawes [illegible] for electricity? Q.
Then he came to you, Mr. Hunn, did he say he was in pain? A. He said
yes. Q. He complained of pain, didn't he? A. Yes." The witness
denied that he did not positively claim that he had drugs, electric
or "water on the brain." In the light of all the evidence in court
stated that there was a clear case against defendants, and therefore
counsel for defendants requested it be heard. "We can present the matter
in an unsatisfactory manner."

Defendant contends that knowledge and using electric electrodes
and electric lamps upon the human body does not constitute a violation
of the Medical Practice Act of this state. It may be conceded that such
instruments, standing alone, could not constitute a violation of the
act. Defendant further contends that under the testimony he did not
to call his patient medicines and the mix of water with medicine in his
treating human ailments within the provisions of section 1. It may
also be contended that the mere selling of patent medicines is not a

violation of said Section. The trial court held that under the proof the defendant was clearly guilty of a violation of Section 24, and we find ourselves in full accord with this finding. The testimony of Hagan and his cousin makes out a clear prima facie case under Section 24. Indeed, as the trial court held, defendant's testimony supports the charge. None of the cases cited in support of defendant's contention that the evidence did not show that he violated Section 24 apply to the facts of the instant case. State Board of Medical Examiners of N. J. v. Dussinger, 154 Atl. 325, holds that the defendant, who conducted a gymnasium where baths and massages were given and where electrical vibrators and sun-ray lamps were used, did not violate the statute of New Jersey regulating the practice of medicine. Thompson v. State, 153 So. (Ala.) 469, holds that one giving massages with his hands to two parties for whom he prescribed no medicine, lotion, or method of treatment for pains in the shoulder and neck is not guilty of treating human diseases. People v. Hettiger, 150 Ill. App. 449, holds that the mere giving of massage treatments professionally falls within the profession of a trained nurse and one who gives such treatments is not required to be licensed. There the court held that the evidence did not show that the defendant had treated any of the parties for disease, or had diagnosed the difficulties of any of the parties to whom she gave treatment as being any disease, and that all she did was to give massage treatments. People v. Carr, 276 Ill. 329, and People v. Smith, 208 Ill. 31, are not applicable to the facts of the instant case.

Defendant contends that the venue was not proven. During the direct examination of the prosecuting witness the following occurred: "Q. This all happened in the City of Chicago, County of Cook and State of Illinois? A. Right." Defendant argues that the words used by the examiner did not constitute a question, and that the meaning of the word "right" cannot be determined with any certainty. We

violation of said doctrine. The trial court held that under the proof the defendant was directly guilty of a violation of Section 84, and we find ourselves in full accord with this finding. The testimony of Hagen and his friends below was a clear [illegible] more than [illegible]. Indeed, on the trial court's finding, defendant's testimony supports the charge. Some of the cases cited in support of defendant's contention that the criminal did not aver that he violated Section 84 apply in the facts of the instant case. [illegible] United States Prudential Co. v. [illegible], 124 Ala. 329, holds that the defendant, who constructed a gymnasium where balls and musicians with pipes and other diversions and amusements were used, did not violate the statute of the Jersey regulating the practice of medicine. [illegible] v. [illegible], 128 Pa. (Ia.) 420, holds that one giving massages with his hands is not guilty for that he practices medicine, Sections, or method of treatment for pain in the shoulder and back is not guilty of treating human diseases. [illegible] v. [illegible], 120 Ill. App. 422, holds that the mere giving of massage treatments professionally falls within the profession of a trained nurse and has the right such treatments is not required to be licensed. There the court held that the evidence did not show that the defendant had treated any of the sufferer for disease, or had diagnosed the affliction of any of the parties to whom she gave treatment as being any disease, and that all she did was to give massage treatments. [illegible] Court, 219 Ill. 327, and [illegible] v. [illegible], 208 Ill. 22, are not applicable to the facts of the instant case.

Defendant contends that the verdict was not proper. Under the direct examination of the prosecution witness the following appears: "Q. This all happened in the city of [illegible], County of [illegible] State of Illinois? A. Right." Defendant argues that the words, used by the examiner in not designate a question, and that the meaning of the word "right" cannot be interpreted with any certainty. In

find no merit in the contention nor argument. No objection was made to the form of the question, nor the answer, and it is somewhat difficult to treat the contention seriously. In addition to the foregoing testimony the application made by E. P. Maza & Co., of Chicago, Illinois, to the United States Patent Office in the matter of the trade-mark, and which was introduced by defendant to justify his sale of the patent medicine, states that E. P. Maza & Co. is a firm domiciled in Chicago, county of Cook and State of Illinois, and doing business there, and attached to the application is an affidavit by defendant which is headed, "State of Illinois county of Cook ss:" The certificate of the United States of America in reference to the trade-mark states, "E. P. Maza & Co., of Chicago, Illinois." There are a number of statements in the evidence that tend to show that the witnesses for both sides lived in Chicago, Illinois.

Defendant contends that the evidence fails to establish the guilt of defendant beyond a reasonable doubt. We find no merit in this contention. We are satisfied that the finding of the court was fully warranted by the evidence.

Defendant contends that while the information charges defendant with a violation of Section 24, the judgment of the court finds him guilty of a violation of Section 25, and that the judgment entered is therefore an erroneous one. There is merit in this contention. The court found defendant "guilty in manner and form as charged in the information herein," and sentenced him to six months in the House of Correction. This was a correct finding, and the sentence imposed was fully warranted under the evidence.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to enter a judgment against the defendant in accordance with the charge contained in the information, and the finding of and the sentence imposed by the trial court.

JUDGMENT REVERSED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

that we merit in the competition not[illegible]. The objection was made to the form of the question, was too broad, and it is somewhat difficult to have the commission satisfactorily. In relation to the financial situation the application made by [illegible], of Chicago, Illinois, to the United States Trade Office in the matter of the [illegible], and which was introduced by [illegible] in justify the sale of the patent medicine, which [illegible] is a [illegible] in Chicago, namely of [illegible] of Illinois, and [illegible] business there, and attached to the application is an affidavit by [illegible] which is found, "there of Illinois [illegible] or [illegible] the [illegible] of the United States of America in [illegible] to the [illegible] states." [illegible] "There are a number of [illegible] in the [illegible] that [illegible] the witnesses for both sides lived in Chicago, Illinois.

Defendant contends that the [illegible] value or existence the [illegible] of defendant beyond a reasonable doubt. We find no merit in this contention. We are satisfied that the finding of the court was fully warranted by the evidence.

Defendant contends that with the interpretation [illegible] and with a violation of Section 24, the judgment of the court finds the [illegible] of a violation of Section 22, and that the judgment [illegible] is therefore an erroneous one. There is merit in this contention. The court found defendant "guilty in manner and form as charged in the [illegible] Section," but [illegible] the [illegible] in the [illegible] of [illegible]. This was a [illegible] finding, and the evidence [illegible] was fully warranted under the [illegible].

The judgment of the municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to enter a judgment against the defendants in accordance with the finding made herein in the intermediate, and the finding of and the [illegible] imposed by the trial court.

Judgment reversed and remanded.

McLaren and Tyson, Jj., concur.

38295

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee,
Appellant,

v.

HARRY S. LORCH et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

283 I.A. 643

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

First Union Trust and Savings Bank, a corporation, filed its bill to foreclose a trust deed executed on June 15, 1926, by defendant Melbert W. Lorch to secure sixty-one bonds aggregating $30,000. "Melbert W. Lorch * * * disappeared (apparently a suicide) * * * on October 3, 1926." By mesne conveyance Harry S. Lorch and Lorraine Lorch, defendants, became the legal owners of the property in question. An amendment and supplement to the bill sets forth the consolidation of First Union Trust and Savings Bank with The First National Bank of Chicago, a corporation. The cause was referred to a master, who found (inter alia) that bonds Nos. 1 to 9, both inclusive, each in the sum of $500, had been paid; that bonds Nos. 10 to 31, both inclusive, became due, by their terms, on July 1, 1931; that on January 30, 1932, Harry S. Lorch and Lorraine Lorch entered into a written extension agreement whereby the time of payment of the outstanding bonds was extended so that they became due January 1, 1933. The master further found that when the bonds matured "Harry S. Lorch and Lorraine Lorch, his wife, did not, nor did any one for them, or in their behalf, or any, or either of them, pay said principal and interest so maturing on said 1st day of January, 1933, or any part thereof, but did make default in that respect, which default still

First Union Trust and Savings Bank, a corporation, filed its bill in Franklin a trust deed executed on June 11, 1928, by defendant Delbert V. Lynch in order clerk-one week expiring $20,000. "Maintain N. Lynch - - - disappeared (apparently a suicide) - - - on October 8, 1928." By mesne conveyance Henry E. Lynch and Christine Lynch, defendants, become the legal owners of the property in question. On commencement and replacement to the bill was filed the consolidation of First Union Trust and Savings Bank with the Illinois National Bank of Chicago, a corporation. The owner was interested in a mortgage, who found (Henry Lynch) that bonds Nos. 2 to 9, both inclusive, must in the sum of $500, had been paid; that bonds Nos. 10 to 21, both inclusive, bonds Nos. 22, by their terms, on July 1, 1931; that on January 20, 1931, Henry E. Lynch and Christine Lynch waived the written notice requirements whereby the time of payment of the outstanding bonds was accelerated so that they became due January 1, 1932. The master further found that when the bonds matured "Henry E. Lynch and Christine Lynch, his wife, did not, nor did they ever for them, or in their behalf, or any, or either of them, pay or cause to be paid and interest to maturity on said 1st day of January, 1932, or any part thereof, but did make default in that respect, which default still

continues;" that the total amount due complainant was $31,617.53; that by the terms of the extension agreement Harry S. Lorch and Lorraine Lorch, his wife, agreed to pay the principal indebtedness in the amount of $25,500 and interest thereon, and that they were therefore personally liable for the indebtedness in the amount of $30,398.13. The exceptions of said defendants to that part of the master's report finding that they were personally liable for the said indebtedness were sustained by the chancellor.

Plaintiff contends that the chancellor erred in sustaining said exceptions to the report, and further erred in failing to find in the decree that Harry S. Lorch and Lorraine Lorch were personally liable for the debt and subject to a deficiency decree and execution. Whether or not the extension agreement makes them personally liable is the question before us for review.

The extension agreement recites the essential parts of the trust deed and bonds, that Melbert W. Lorch had caused bonds 1 to 9 to be paid, and that the balance due, $25,500, matured July 1, 1931. It further recites:

"AND WHEREAS, the said Harry S. Lorch, as present owner of the premises described in said Trust Deed, desires the owner or owners of said unpaid and outstanding bonds to extend the time of payment of the principal of said bonds so that all of said unpaid and outstanding bonds secured by said Trust Deed, aggregating the principal sum of Twenty-five Thousand Five Hundred Dollars shall be payable as hereinafter set forth;

"NOW, THEREFORE, in consideration of the premises and the agreements hereinafter made to be kept and performed by the said Harry S. Lorch and Lorraine Lorch, his wife, the time of payment of all of the unpaid and outstanding bonds secured by said Trust Deed, being bonds numbered ten to twenty-four, both inclusive, for the principal sum of One Hundred Dollars each, bonds numbered twenty-five to fifty, both inclusive, for the principal sum of Five Hundred Dollars each, and bonds numbered fifty-one to sixty-one, both inclusive, for the principal sum of One Thousand Dollars each, aggregating the principal sum of Twenty-five Thousand Five Hundred Dollars, shall be and are hereby extended so that the principal sum of each and everyone of said outstanding bonds heretofore described shall be payable on the first day of January, 1933, together with interest on each of said bonds from July 1st, 1931, until maturity at the rate of 6% per annum, payable on July 1st, 1932, if sufficient funds have been deposited as hereinafter required to pay such interest, otherwise with interest at the rate of 6% per annum from July 1st, 1931, until maturity, payable on January 1st, 1933. Said bonds and interest payments shall bear interest at

continuously" that the total amount due complainant was $20,677.62; that by the terms of the extension agreement Harry E. Lerch and Jacqueline Lerch, his wife, agreed to pay the principal indebtedness in the amount of $20,000 and interest thereon, and that they were therefore personally liable for the indebtedness in the amount of $20,322.12. The complaint of said defendants to that part of the master's report finding that they were personally liable for the said indebtedness were sustained by the chancellor.

Plainly contends that the chancellor erred in sustaining said exceptions to the report, and further erred in failing to find in the decree that Harry E. Lerch and Jacqueline Lerch were personally liable for the debt and subject to a deficiency decree and execution, whether or not the extension agreement made them personally liable in the original matter as far matter.

The extension agreement recites the essential parts of the trust deed and bonds, that Delbert V. Lerch had caused bonds 2 to 9 to be paid, and that the balance due, $20,000, matured July 1, 1933, is further recited:

"AND WHEREAS, the said Harry E. Lerch, as present owner of the premises described in said Trust Deed, desires the owner or owners of said bonds and coupons hereby to extend the time of payment of the principal of said bonds as hereinafter set forth and accept and substituting the said Harry E. Lerch, his wife, as the principal obligors for said bonds and coupons, accordingly the principal sum of twenty-five thousand five hundred dollars shall be payable as hereinafter set forth:

"NOW, THEREFORE, in consideration of the premises and the extension herein mentioned to be kept and performed by the said Harry E. Lerch and Jacqueline Lerch, his wife, the time of payment of all of the said principal and interest hereby secured by said Trust Deed, shall be extended and the principal of said bonds shall be payable in installments, in the principal sum of twenty-five thousand five hundred dollars, which is now due, as follows:

"$1,000 on the principal sum of said bonds and coupons on the first day of January, 1933, together with interest on said principal sum at the rate of six per cent from July 1st, 1933, until maturity, payable in January and July, 1934. Said bonds and interest payments shall bear interest at the rate of six per cent from July 1st, 1933, until maturity, payable in January and July, 1934. If additional funds have been deposited in interest bearing accounts in pay some interest, expenses with interest at the rate of six per cent from July 1st, 1933, until maturity, payable in January and July, 1934. Said bonds and interest payments shall bear interest at

the rate of seven per cent per annum after due, whether by the terms of said bonds or this agreement or by election as hereinafter provided. All bonds and interest payments shall be payable in gold coin of the present standard of weight and fineness at the office of the First Union Trust and Savings Bank, Chicago, Illinois.

"IN CONSIDERATION of such extension, and the sum of one dollar to the undersigned in hand paid, the receipt and sufficiency of which is hereby acknowledged, the undersigned, Harry S. Lorch and Lorraine Lorch, his wife, covenant and agree that: (1) commencing on November 10th, 1931, and on the tenth day of each and every calendar month thereafter to and including the month of December, 1932, the undersigned, Harry S. Lorch and Lorraine Lorch, his wife, or their duly authorized agent will deposit with the First Union Trust and Savings Bank the net income for the previous month after deducting operating expenses, including taxes subsequent to the year 1929, and special assessments received from the property securing the above Trust Deed; also a complete statement of operation, which statement shall set forth in detail all items of income and expenses and the amounts thereof for the previous month; (2) to operate and control the improvements located on such premises in an efficient and businesslike manner, and to keep and maintain such premises in good repair; (3) to operate and manage such premises and the buildings located thereon without charge or obligation to any of the holders of bonds secured by said Trust Deed, Trustee or its successor Trustee thereunder; (4) to pay the general taxes for the year 1929 levied against such premises before any sale of said premises for satisfaction thereof; (5) such bonds are evidence of a valid debt for the aggregate principal sum of Twenty-five Thousand Five Hundred Dollars; (6) to pay the same and interest thereon as provided in this agreement; (7) that all of the terms, covenants and provisions in said bonds and Trust Deed contained shall stand and remain unchanged and in full force and effect for said extended period, and any subsequent extension thereof except only as the same are hereby or by any subsequent extension agreement specifically varied or modified, and to keep and perform all of the terms, covenants and provisions of said bonds and Trust Deed as hereby or hereafter modified and of this agreement, and that in the event of default in the performance of any of the terms, covenants and provisions herein, and/or in said bonds and/or said Trust Deed contained, the whole of said principal sum, together with accrued interest thereon shall, at the election of the holder or holders of said bonds, become due and payable and may be collected in the same manner by foreclosure or otherwise in accordance with the terms of said bonds and as provided for in said Trust Deed as if this extension had not been made; anything hereinbefore contained to the contrary notwithstanding; (8) that the time of payment of one or more of said bonds or any part thereof may be extended from time to time hereafter upon such terms and conditions as may be agreed upon by the parties making such extension including the increase of the rate of interest thereon and any amendment to or change of the terms, covenants and provisions of said Trust Deed and/or said bonds, all upon the written consent of the undersigned, and that no such extension, amendment or change shall modify, alter, limit, release or affect the liability of the undersigned for the payment of said bonds and interest thereon or the lien of said Trust Deed; and waive presentment for payment, notice of dishonor, protest, notice of protest and diligence in collection as to any evidence of the indebtedness aforesaid or any part thereof; (9) that all of the terms hereof shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns of the undersigned and the holders of said bonds.

"IN EVERY CASE of partial payment of any of said outstanding

and unpaid bonds or the interest thereon, such partial payment shall be noted thereon.

"NOTHING HEREIN contained shall be construed as a novation or as in any way modifying, altering, affecting, releasing, or limiting the liability, whether primary or secondary, of the undersigned for the payment of any sum secured to be paid by said Trust Deed, but the right of recourse against the undersigned is hereby expressly reserved.

"WITNESS THE HANDS and seals of the undersigned this 30 day of January, 1932.

"HARRY S. LORCH (Seal)
"LORRAINE LORCH (Seal)"

Plaintiff contends that the extension agreement specifically provides for the payment of the bonds by Harry S. Lorch and Lorraine Lorch in accordance with the terms and provisions of the trust deed as extended. Defendants contend that the only liability assumed by said defendants was to pay the debt as provided in the agreement, viz., by turning over the net income of the property to plaintiff and "to manage and control the property efficiently, to make no charge therefor, and to render monthly statements, all for the direct benefit of the bondholders." Both parties agree that in determining the instant question the entire extension agreement must be considered.

What was the situation at the time of the making of the agreement? The signer of the trust deed and bonds had disappeared six years prior to that time. Defendants state that he had apparently committed suicide. It is clear that they desired an extension in order to protect their title, to stave off foreclosure proceedings, and to save receivership fees and other costs by collecting the rents themselves and depositing the same against the indebtedness. Why should plaintiff enter into the extension agreement unless it received something in return? It could have gone ahead, foreclosed, and had a receiver appointed, but, as the extension agreement recites, "Harry S. Lorch, as present owner of the premises described in said Trust Deed, desires the owner or owners of said unpaid and outstanding bonds to extend the time of payment of the principal of said bonds so that all of said unpaid and outstanding bonds secured by said Trust

Deed, aggregating the principal sum of Twenty-Five Thousand Five Hundred Dollars shall be payable as hereinafter set forth." By clause 5 of the agreement defendants acknowledge the debt, and it seems clear to us that by clauses 6, 7, 8 and 9 defendants agreed to pay the bonds and interest in accordance with the terms and provisions of the trust deed as extended. It would be idle to argue that there was no consideration for such an agreement. Melbert Lorch was either dead or, if living, was no longer interested in the matter of the trust deed and bonds. Harry Lorch and Lorraine Lorch were vitally interested in securing the extension. At the time the agreement was signed it was practically impossible, because of the great depression, for mortgagors to meet their mortgage obligations, but it was the common belief that if a year's extension could be secured the properties involved could be saved. Defendants' promise to pay, and their promise to do certain things under clauses 1, 2, 3 and 4, are distinct and separate undertakings. Defendants' handling of the property, in lieu of a receiver, was for their benefit, as it afforded them a better opportunity to conserve the property and to pay the bonds. But to sustain the argument of defendants that all that they assumed, under the extension agreement, was the duty to manage the property and to derive, for the benefit of the bondholders, the maximum income, at no cost to the bondholders, would require the elimination from the agreement of clauses 5 to 9. If the agreement was intended to relate only to the management of the property and the application of the proceeds to the reduction of the debt, it would have been a very simple matter to have so stated in an agreement. Their present position seems to be a clever afterthought. In our judgment the chancellor erred in sustaining defendants' second, third, fourth and fifth exceptions to the master's report, and further erred in not finding in the decree that Harry S. Lorch and Lorraine Lorch were personally liable for the

that Harry S. Ivers and Lorenzo Lewis were personally liable for the
the mortgage's report, and further moved to not finding in the Lewis
matching defendants' second, third, fourth and fifth exceptions to
that, according the probative use of Harry-Ivers Tenement Site
Instead Policies which be purchase on behalf for Lewis." By
Figure 2 of the agreement distinguishes mortgagee the debt, and is
shown plain to us from by clauses 4, 7, 8 and 9 referenced agreed to
pay the bond and interest in installment with the terms and provisions
of the bond and mortgage. It would be idle to argue that Ivers
was an accommodation for such an agreement. Without Lewis was either
dead or, if living, was no longer interested in the matters of the bond
and bonds. Harry Ivers and Lorenzo Lewis were vitally interested
in securing the mortgagee. At the time the agreement was signed
it was practically impossible, because of the great exigencies for
mortgagors in such their mortgage obligations, but it was the claim
that that if a party's property could be secured the purchaser be-
lieve would be equal. Defendants' premise to pay, and their promise
to do certain things under clauses 1, 2, 3 and 4, are distinct and
separate undertakings. Defendants' handling of the property, in lieu
of a receiver, was for their benefit, as it offered them a better
opportunity to conserve the property and to pay the rents. But to
negate the argument of defendants that all that they assumed, under
the provision agreement, was the duty to manage the property was to
destroy, for the benefit of the bondholders, the material income, it was
used by the bondholders, under exclusive the elimination from the agree-
ment of clauses 7 to 9. If the agreement was intended to relate only
to the management of the property and the application of the proceeds
to the reduction of the debt, it would have been a very simple matter
to have no stated in an agreement. Their present position seems to
be a clever afterthought. In our judgment the chancellor erred in
sustaining defendants' second, third, fourth and fifth exceptions to
the master's report, and further erred in not finding in the Lewis

debt and subject to a deficiency decree and execution.

The finding in the decree that Melbert W. Lerch, who was not personally served, was subject to a deficiency decree and execution was, of course, an erroneous one and should be eliminated from the decree, although plaintiff has no right to complain of the finding.

The decree, in so far as it exempts Harry S. Lerch and Lorraine Lerch from personal liability on the debt, and also in so far as it finds that Melbert W. Lerch is personally liable for the payment of the amounts found due, is reversed, and the cause is remanded for further proceedings in conformity with the views herein expressed.

DECREE REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

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38332

FRANK M. McCARTHY COAL CO., a corporation, Appellee, v. EAGLE INDEMNITY COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 643

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in a contract action. The case was tried by the court. There was a finding for plaintiff and its damages were assessed in the sum of $214.92. Defendant appeals from a judgment entered upon the finding.

The statement of claim alleges that defendant issued a policy to plaintiff by the terms of which defendant agreed to insure and indemnify plaintiff from any and all loss or damage by reason of robbery of paymaster, messenger or office, for a period of one year from March 1, 1933, to March 1, 1934, provided that the robbery "occur during the hours of 7 A. M. to 7 P. M.;" that on March 11, 1933, between the said hours the president of plaintiff corporation "was confronted by two white men with revolvers and forced to open the safe on said premises at 455 No. Crawford Ave. in the City of Chicago, Illinois and that the sum of $429.85 in currency was taken by said robbers; * * * that it had a similar policy of insurance with the Fidelity & Casualty Company, a Corp., and that it also presented proofs of loss to said Company and that it has received a pro-ration of fifty percent of said loss, or $214.92 from said Company; * * * that it has suffered a loss in the sum of $214.92 and that although it has repeatedly requested said defendant to pay same it has neg-

283 I.A. 643

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the municipal court of Chicago in a contract action. The case was tried by the court. There was a finding for plaintiff and its damages were assessed in the sum of $414.22. Defendant appeals from a judgment entered upon the finding.

The statement of claim alleges that defendant issued a policy to plaintiff by the terms of which defendant agreed to insure and indemnify plaintiff from any and all loss or damage by reason of robbery of payroll, messenger or office, for a period of one year from March 1, 1922, to March 1, 1924, provided that the robbery "occurring the hours of 7 A. M. to 7 P. M." that on March 11, 1922, between the said hours the president of plaintiff corporation "was confronted by two male men with revolvers and forced to open the safe on said premises at 455 No. Crawford Ave. in the city of Chicago, Illinois and thus the sum of $414.22 in currency was taken by said robbers; " " " that it had a similar policy of insurance with the Fidelity & Casualty Company, a corp., and that it also presented proofs of loss to said Company and that it has received a pro-ratas of fifty percent of said loss, or $414.22 from said Company " " " that it has suffered a loss in the sum of $414.22 and that although it has repeatedly requested said defendant to pay same it has neg-

lected and refused so to do." The sole defense set up in defendant's affidavit of merits was that the robbery occurred before the hour of 7 a.m. and that therefore it did not fall within the terms of the policy.

Defendant states: "The parties stipulated that there was a bona fide hold-up, on the date alleged, that the amount of the loss is correct, that the loss occurred within the premises, and that the policy contract was still in effect on the date of the loss. There was no dispute over any other condition except the time of the hold-up and loss, so that the sole question for the Court to determine is whether or not the robbery and loss occurred within the time limitation as fixed by paragraph indicated by Roman numeral III of the first page of the policy contract and as set forth above. That is to say, did the loss occur during the hours beginning at 7:00 o'clock A.M. and ending at 12:00 o'clock midnight. Notice and proof of loss within the required time are admitted." It contends that the burden was upon plaintiff to prove by a preponderance of the evidence that the loss occurred during the hours beginning at 7 o'clock a.m. and ending at 12 o'clock midnight, and that plaintiff failed to sustain the burden; that the finding of the trial court that the loss occurred within the time fixed by the policy is manifestly against the weight of the evidence. After a careful consideration of the facts and circumstances in the record that bear upon the instant contention, we have reached the conclusion that the contention is without the slightest merit.

Defendant contends that "the court erred in refusing to allow the defendant's motion to strike the plaintiff's testimony fixing the time by a whistle not properly identified or compared to a watch or clock." There is no merit in this contention. The witness Lassar testified that the robbers left the office a little past 7 o'clock a. m. The following then occurred: "Q. How do you fix it as being after seven

Jacket and refused to do so." The sole defense set up in defendant's affidavit of merits was that the robbery occurred before the hour of 7 a.m. and that therefore it did not fall within the terms of the policy.

Defendant argues, "The pertinent stipulation that exists was a burglary policy, as the jury claimed, that the element of the loss is correct, that the loss occurred within the premises, and that the policy insured was still in effect at the time of the loss. There was no dispute over any other conditions except the time of the hold-up and loss, so that the sole question for the court is determine is whether or not the robbery and loss occurred within the time limitation as fixed by paragraph indicated by Roman numeral III of the first page of the policy contract and as set forth above. That is to say, did the loss occur during the hours beginning at TWO o'clock A.M. and ending at 12:00 o'clock midnight, while and proof of loss within the re-spective time limitations." It contends that the burden was upon plain-tiff to prove by a preponderance of the evidence that the loss occurred during the hours beginning at 7 o'clock a.m. and ending at 12 o'clock midnight, and that plaintiff failed to sustain the burden; that the finding of the trial court that the loss occurred within the time fixed by the policy is manifestly against the weight of the evidence. After a careful consideration of the facts and circumstances in the record that bear upon the judicial conclusion, we have reached the conclusion that the conversion is without the slightest merit.

Defendant contends that "the court erred in refusing to allow the defendant's motion to strike the plaintiff's testimony fixing the time by a timepiece not properly identified or compared to a watch or clock." There is no merit in this contention. The witness Lamont testified that the robbers left the office a little past 7 o'clock a. m. The following then occurred: "Q. How do you fix it as being after seven

o'clock? A. Because the whistle had blown over at the Northwestern car shop. Q. Where is the Northwestern car shop with reference to the Frank McCarthy coal yard? A. It is right across from our yard. Q. The yard is on Crawford avenue? A. Yes. Q. And the Northwestern car shops start at Crawford Avenue and go west, is that right? A. Yes. The Court: Q. Did the whistle blow before they came out of the building? A. Yes, sir. * * * The Court: Q. When they opened the door and came out the whistle had blown already? A. Yes, the whistle had blown already. Mr. Wilber (attorney for defendant): I object to something about a whistle having been blown. The Court: Overruled. Q. The seven o'clock whistle had blown? A. Yes. Mr. Wilber: Exception." It further appears that on cross-examination counsel for defendant cross-examined the witness at length in reference to the blowing of the whistle. During the cross-examination the witness stated that for 13 years he had heard the Northwestern whistle at 7 o'clock a. m. and that he had at times set his watch by it. It will be noted that the witness testified to the blowing of the seven o'clock whistle without objection, and that the sole objection was made to an answer subsequently made by the witness. Defendant made no motion to strike plaintiff's testimony in reference to the blowing of the whistle. Had defendant properly preserved the point it now makes there would be no merit in it.

It is not without some significance that Fidelity & Casualty Company paid its pro-rata share of the loss sustained by plaintiff. The trial court was not favorably impressed with the defense and was evidently of the opinion that defendant was seeking to evade the payment of a just claim. From a reading of the entire evidence we get the same impression.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

o'clock? A. Because the whistle had blown over on the northwestern car shop. Q. Have in the northwestern car shop with reference to the fresh industry your part? A. It is right across from our yard. Q. The yard is on Crawford avenue? A. Yes. Q. And the northwestern car shops start at Crawford avenue and go west, is that right? A. Yes. The Court: Q. Did the whistle blow before they came out of the building? A. Yes, sir. * * * The Court: Q. When they opened the door and came out the whistle had blown already? A. Yes, the whistle had blown already. Mr. Vilber (attorney for defendant): I object to something about a whistle having been blown. The Court: Overruled. Q. The seven o'clock whistle had blown? A. Yes. Mr. Vilber: Exception." It further appears that on cross-examination counsel for defendant asked the witness as follows: "Q. Is reference to the blowing of the whistle. During the cross-examination the witness stated that for 13 years he had heard the Northwestern whistle at 7 o'clock a. m. and that he had at times set his watch by it. It will be noted that the witness testified to the blowing of the seven o'clock whistle without objection, and that the main objection was made to an answer subsequently made by the witness. Defendant made no motion to strike plaintiff's testimony in reference to the blowing of the whistle. Mr. Defendant properly preserved the point it now makes there could be no merit in it.

It is not without some significance that Fidelity & Casualty Company paid its pro-rata share of the loss sustained by plaintiff. The trial court was not favorably impressed with the defense and was unmindful of the evidence that Fidelity was seeking to cross the payment of a just claim. From a reading of the entire evidence we get the same impression.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

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38353

C. J. STRESLOW, Appellee, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 643

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in a contract action. In a trial by the court there was a finding in favor of plaintiff and his damages were assessed in the sum of $950. Defendant appeals from a judgment entered upon the finding.

Plaintiff's statement of claim alleges:

"1. Plaintiff resides at 1725 Mohawk Street, Chicago, Illinois, has subscribed to the services offered by the Magazine of Wall Street and makes investments from time to time.

"2. That on to-wit: July 18, 1933 the plaintiff was the owner of 100 shares of Distillers Seagrams.

"3. That on to-wit: the 18th day of July, 1933 the Investment and Business Forecast of the Magazine of Wall Street, 90 Broad Street, New York, delivered to the defendant a message which the defendant accepted to be transmitted by defendant's telegraph wire from New York City to Chicago, for compensation to be collected from the plaintiff upon delivery, the message being as follows: 'Mount Gaspion Distillers Seagrams,' being a code message meaning, 'Close out at the market Distillers Corporation--Seagrams,' the wire being deposited approximately 8:55 A.M. Eastern Standard Time.

"4. That the defendant did not deliver the said message to the plaintiff by reason whereof the plaintiff was prevented from disposing of his said stock aforesaid at the then prevailing market prices for said stock which averaged 47½; that when plaintiff learned of the message, he immediately ordered said stock sold and received therefor $38.00 per share; that plaintiff has been grievously damaged through the failure and neglect of the said defendant to deliver said message in the sum of Nine Hundred Fifty Dollars."

Plaintiff states his theory of fact as follows:

"Plaintiff was a subscriber in good standing in Investment and Business Forecast of the Magazine of Wall Street on July 18, 1933, and on that date the Telegraph Company received a message filed with it by the Investment and Business Forecast of the Magazine of Wall Street at 8:55 A.M. Eastern Standard Time, addressed to the plaintiff, to be sent by defendant over its wires, and for which the defendant was to receive compensation from the plaintiff at time of delivery; that the text of the message read, 'Mt. Caspion Distillers Seagrams' and was signed, 'Woodhaven'; that the message de-coded meant, 'Sell at the market Distillers Seagrams'; that he did not receive the message; that the message should have been delivered to him prior to the opening of the stock market in Chicago; that had he received the message, he would have ordered his stock, consisting of 100 shares Distillers Seagrams, sold prior to the opening of the market; that on the morning of July 18, 1933 he was in his broker's office about 10:00 o'clock, which was one hour after the opening of the market and one hour after telegram should have been delivered, and noting the fluctuating of the market, put in an order for the sale of 100 shares of stock at 48; nine minutes later he ordered stock sold at market, and was later advised his stock was sold for 38; that the market at the opening and up to the time of his arrival, was in excess of $47.50 per share; that because the telegram had not been delivered, he lost an average of $950; that the Telegraph Company handled in excess of 880 messages identical to this one in the Chicago area, knew that it referred to a financial transaction to either buy or sell on the market; that the Telegraph Company admitted, through its agent, Miss Moule, that it had received the message addressed to C. J. Strehlow and read him the message over the 'phone; that subsequently, the Telegraph Company admitted in writing that the message had gone astray and requested damages to be itemized; that plaintiff did so and six months later the Telegraph Company declined to pay, stating it had not received the message."

Defendant's theory of defense, in part, is as follows:

"(a) The defendant did not receive nor accept any telegram for delivery or transmission to the plaintiff as alleged in the statement of claim.

"(b) Plaintiff could not recover damages inasmuch as the message was in code, and did not disclose upon its face that it related to a business transaction and did not disclose the transaction so far as was necessary to accomplish the purpose for which sent.

"(c) The defendant not being advised nor having knowledge of the meaning of said code message, no damages could have been in the contemplation of the parties at the time of the making of the contract as the probable result of a breach of contract of transmittal."

Plaintiff was a subscriber to a "financial service" rendered by the Investment and Business Forecast of the Magazine of Wall Street, located in New York City. Magazine had been furnishing plaintiff with recommendations regarding the purchase and sale of stocks. On July 17, 1933, after the receipt of a telegram signed "Woodhaven" (Woodhaven being the code signature of the Magazine), he purchased 100 shares of Seagrams Distillers. It is conceded that he did not receive a

"Plaintiff was a shareholder in good standing in Investment and Business Personnel of the Magnolia of Wall Street in 1933, and on that date the Telegraph Company received a message filed with it by the Investment and Business Personnel of the Magnolia of Wall Street of New York. Western Diamond Time, addressed to the plaintiff, to be sent by defendant over its wires, and for which the defendant was to provide compensation, from the plaintiff at time of delivery; that the text of the message read, 'Mr. Theodore Hilliard Bergman' and was signed, 'Goldsteen'; that the message de-coded read, 'Sell at the market Pacifica Company'; that he did not receive the message; that the message should have been delivered to him prior to the opening of the stock market in Chicago; that had he received the message, he would have ordered his stock, consisting of 100 shares Pacifica Company, sold prior to the opening of the market; that on the morning of July 14, 1933 he was in the broker's office about 11:00 o'clock, which was one hour after the opening of the market and one hour after Bergman should have been delivered, and selling the Pacifica of the market, put in an order for the sale of 100 shares of stock at 48; also returned later to discover that with at market, and was later advised his stock was sold for 20; that the market as the opening and by the time of his arrival, was in excess of 47.50 per share; that because the telegram had not been delivered, he lost an average of 2.50; that the Telegraph Company handled in excess of 500 messages identical in this one to the Chicago stock, knew that it failed to a financial transaction in either Chicago or Wall St; that the Telegraph Company admitted, through its agent, Miss Jones, that it had received the message addressed to T. Bergman and read the message over the 'phone; that knowingly, the Telegraph Company admitted in stating that the message had been sent and requested Bergman to be identified; that plaintiff did so and six months later the Telegraph Company declined to pay, stating it had not received the message."

Defendant's theory of defense, in part, is as follows:

"(a) The defendant did not receive nor accept any telegram for delivery or transmission to the plaintiff as alleged in the statement of claim.

"(b) Plaintiff could not recover Bergman Investment as the message was in code, and did not disclose upon its face that it related to a business transaction and did not disclose the transaction or for or the necessary to investigate the purpose for which sent.

"(c) The defendant not being advised nor having knowledge of the meaning of said code message, no damages could have been in the contemplation of the parties at the time of the making of the contract as the probable result of a breach of contract of transmission."

Plaintiff was a subscriber to a "Financial service" conducted by the Investment and Business Personnel of the Magnolia of Wall Street, located in New York City. Subjects had been furnishing plaintiff with recommendations regarding the purchase and sale of stocks. On July 17, 1933, after the receipt of a telegram signed "Goldsteen" (defendant being the sole signatory of the telegram), he purchased 100 shares of Pacifica Distillery. It is conceded that he did not receive a

telegram from Magazine on July 18, 1933. It is undisputed that on the morning of that day defendant received from Magazine a message reading, "Mount Caspian Distillers Seagrams" signed "Woodhaven," together with a galley or list of names to whom Magazine desired this message to be sent. Magazine was in the habit of filing with defendant messages to be sent to its subscribers, and to facilitate the handling of these messages defendant had "prearranged books or lists of names to which the Magazine referred when it desired to send telegrams to certain of these lists; that the names on the lists varied in number from 200 to 1500, and that they were subject to change from day to day as the subscriptions expired or were renewed or new subscribers obtained." Defendant concedes that prior to July 18 Strehlow had been on a list of names furnished by Magazine, but its testimony shows that plaintiff's name did not appear on the list of 882 names attached to the message in question filed by Magazine on July 18 and that therefore the telegram was not sent to him. A letter of Magazine to plaintiff dated August 8, 1933, regrets that plaintiff should have received letters from Magazine soliciting his subscription renewal "after it had already been received, and we have corrected the clerical error that resulted in this." The letter further states: "Our telegram 'close out at the market Distillers Corporation-Seagrams' was sent out from this office at approximately 8:35 A.M. Eastern Standard Time on July 18th." It will be noted that Magazine does not state in this letter that plaintiff's name was on the list it furnished that day to defendant, although the letter was in answer to plaintiff's letter of complaint. Plaintiff did not call as a witness anyone connected with Magazine to show that the list furnished defendant on July 18 contained plaintiff's name, although depositions were taken in New York City in February, 1935.

Defendant contends that it was incumbent upon plaintiff to prove that it received or accepted the alleged telegram for delivery

to plaintiff, as alleged in the statement of claim, and strenuously argues that the trial court's finding in that regard was against the manifest weight of the evidence. After a careful examination of the entire evidence bearing upon this contention we have reached the conclusion that the contention is a meritorious one. In an effort to sustain the burden of proof plaintiff was allowed, over the objection of defendant, to testify that about July 21 he had received a letter from Magazine which stated that a telegram had been sent to him on July 18 directing him to sell the stock in question. Plaintiff was also allowed to introduce, over the objection of defendant, the letter from Magazine, dated August 8, 1933. It seems hardly necessary to state that this oral testimony and the letter were not competent against defendant. Plaintiff attempts to justify the introduction of the letter by claiming that defendant, by its cross-examination of plaintiff, made the letter competent. There is no merit in plaintiff's position. When this incompetent evidence is disregarded it is absolutely clear that the finding of the trial court was against the manifest weight of the evidence.

Other contentions are raised by defendant in support of its argument that the judgment should be reversed, but in our view of this appeal we do not consider it necessary to pass upon the same.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

Sullivan and Friend, JJ., concur.

the plaintiff, is alleged in the statement of claim, and strenuously argued that the trial court's finding in that regard was against the manifest weight of the evidence. After a careful examination of the entire evidence bearing upon this contention we have reached the conclusion that the contention is a meritorious one. In an effort to undermine the burden of proof plaintiff was allowed, over the objection of defendant, to benefit that phase July 22 he had received a letter from Hungarian which stated that a bolgerman had been sent to him on July 12 directing him to sell the stock in question. Plaintiff was also allowed to introduce, over the objection of defendant, the letter from Hungarian, dated August 8, 1922. It seems hardly necessary to state that this oral testimony and the letter are completely hearsay evidence. Plaintiff attempts to justify the introduction of the letter by claiming that defendant, by the cross-examination of plaintiff, made the letter admissible. There is no merit in plaintiff's position. When this incompetent evidence is disregarded it is unmistakably clear that the finding of the trial court was against the manifest weight of the evidence.

Other contentions are raised by defendant in support of the argument that the judgment should be reversed, but in our view of the appeal we do not consider it necessary to pass upon the same.

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Holdrege and Tyler, JJ., concur.

38185

ROBERT VERNON JONES and
ELSIE BROWN JONES,
Appellees,

v.

STATE BANK OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 643

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree of the Superior court directing it to pay complainants $3,580.37. The controversy arises out of the rescission by complainants of a contract for the sale of real estate.

It appears from the record that January 30, 1931, defendant, as trustee, under the provisions of a trust agreement creating the State Realty Trust, an unincorporated association, contracted in writing with complainants to convey to them by a good and sufficient trustee's deed improved real estate situated in the village of Winnetka, for a stated consideration of $18,500. By the terms of the agreement the deed was to be subject to building restrictions, use and occupancy of the property, party walls of record, if any, general taxes for the year 1931 and subsequent years, special assessments thereafter levied or confirmed, all unpaid special taxes or special assessments levied for improvements not yet completed, zoning, building laws and ordinances and to a trust deed from State Bank of Chicago, as trustee, to Foreman State Trust & Savings Bank, as trustee, securing one note in the sum of $13,000, due January 30, 1936, bearing interest at the rate of 6% per annum, payable semi-

annually, in July and January of each year. As part of the purchase price complainants assumed and agreed to pay the mortgage indebtedness, and the balance of the purchase price, $5,500, was to be paid in semiannual installments in January and July of each year, together with interest at the rate of 6% per annum.

Paragraph 7 of the contract contained the following provision:

"At the time of the delivery of the deed hereunder the party of the first part agrees to deliver the guarantee policy of the Chicago Title & Trust Company in the sum of $18,500 in its usual form, guaranteeing the parties of the second part against loss or damage by reason of defects in the title of the grantor to said premises at the date thereof, subject to the usual form objections contained in all guarantee policies of the Chicago Title and Trust Company and to all matters to which said trustee's deed is to be subject to, and to this contract."

March 13, 1933, Robert Vernon Jones, one of the complainants, tendered to defendant's representatives in gold certificates the full amount then remaining unpaid on the purchase price of the property, and demanded a deed to the premises and the guarantee policy provided for in paragraph 7 of the contract. The deed was tendered him, which he refused to accept on the ground that a certain instrument known as the Hoops' covenant, which required plaintiffs to pay without objection certain special assessments which might be levied on the property before 1938, created a defect in the title. Defendant's representative thereupon suggested that the moneys to be paid by complainants should be deposited in escrow until a proper guarantee policy could be obtained from the Chicago Title & Trust Company. Jones refused to comply with the suggestion and demanded a return of all money paid by complainants under the contract, and, it being refused, they (the complainants) rescinded the contract and filed their bill of complaint seeking to recover the money paid by them to defendant under their contract.

The sole question presented for determination is whether complainants had the right to rescind. They based their rescission on the existence of a certain instrument in writing, signed by William

community, in July and January of each year. As part of the Metropolitan Police complainants assumed and agreed to pay the mortgage instalments, and the balance of the purchase price, $2,000, was to be paid in monthly instalments in January and July of each year, together with interest at the rate of 6% per annum.

Paragraph 7 of the contract contained the following provisions:

"At the time of the delivery of the deed hereunder the party of the first part agrees to deliver the guarantee policy of the Chicago Title & Trust Company in the year of 1924, on the usual form, guaranteeing the purchaser of the second part against loss or damage by reason of defects in the title of the premises as with premises as the date thereof, subject to the usual terms objections contained in all guarantee policies of the Chicago Title and Trust Company and to all matters to which said property's deed is to be subject to, and to title exceptions."

Since 1924, Robert Turner died, one of the complainants, married in Indiana's marriageable age and attempted the full amount that remaining unpaid on the purchase price of the property, and discovered a deed in the premises and the guarantee policy provided for in paragraph 7 of the contract. The deed was therefore, which he refused to accept on the ground that a certain instrument known as the "dower" covenant, which required plaintiffs to pay without objection outside credit commercial which might be filed on the property before 1924, appears a defect in the title. Defendant's representative therefore insisted that the money to be paid by complainants should be deposited in escrow until a proper guarantee policy could be obtained from the Chicago Title & Trust Company. Upon refusal to comply with the suggestion and demanded a return of all money paid by complainants under the contract, and, it being refused, they filed their complaint.

Tracing the contract and filed their bill of complaint seeking to rescind the money paid by them in rightful their title.

The sole question presented for determination is whether complainants had the right to rescind. They based their conclusion on the existence of a material instrument in writing, signed by Tillion Plaintiff and the right to rescind.

H. Hoops, dated September 19, 1922, which they contend impairs the title, and, unless removed, makes it impossible for defendant to convey to them such good and merchantable title as defendant agreed to convey. The provisions of the Hoops agreement are as follows:

"To the President and Members of
the Board of Trustees of the Village
of Winnetka, Illinois:

In consideration of the approval by the President and Village Clerk of the Village of Winnetka of a proposed plat of a subdivision of the south forty-five (45) acres of the west ninety (90) acres, of the northwest quarter (NW¼) of section twenty (20), township forty-two (42) north, range thirteen (13) east of the Third P.M., in Cook County, Illinois, also known as Winnetka Manor Subdivision, I do hereby covenant, undertake and agree to install and operate until such time as a general drainage improvement to serve this and adjoining sections of the Village of Winnetka has been constructed, at my own expense, an adequate storm water pumping plant to take care of all the flood storm water upon said property, said pumping plant to consist of a centrifugal motor driven pump with necessary automatic control, sump well, inlet and outlet pipes, and in a building of neat and substantial construction. The installation also includes all necessary embankments, ditching, drain pipes, culverts, gates and where roads act as embankments all necessary bank gravel or macadam placed upon the roads.

I do further covenant, undertake and agree that as long as I remain the owner of said property I will approve, accept and pay, without objection all special assessments that may be levied prior to the year 1938 against said property for sanitary and storm water drainage improvement for the above and adjoining sections of the Village of Winnetka, and that in the sale of said property, either directly through me or through any trustee who may secure title to said property for purposes of sale or otherwise, I will include in every deed of conveyance, or agreement for deed of conveyance of any portion of said property, and cause such trustee to include in every such deed of conveyance, or agreement for deed of conveyance of any portion of said property, an express covenant that such property is sold subject to this undertaking and to other restrictions as follows:

(In the Deed of Conveyance) 'a. It is an express condition of this conveyance that the premises herein described to be conveyed shall be subject to the provisions of the zoning ordinances of the Village of Winnetka, Illinois.

(b). No building shall be erected or maintained on said lots less than two stories in height and costing in its construction less than Ten Thousand Dollars ($10,000.00) (necessary garage, barn and outhouses incidental to said building excepted).

(c). It is an express condition of this conveyance that said second party is in all respects subject to and bound by a certain written undertaking of William H. Hoops, dated September 19th, 1922, and filed with the Village Clerk of the Village of Winnetka, Illinois, wherein William H. Hoops, and his assigns,

To Jacob, dated September 12, 1972, which they contend impinge upon the title, and, unless removed, make it impossible for defendant to convey to them such good and marketable title as defendant agreed to convey. The provisions of the Deed restrictions are as follows:

To the President and Members of
the Board of Trustees of the Village
of Glenview, Illinois:

In consideration of the approval by the President and Trustees of the Village of Glenview of a proposed plat of a subdivision of the south fifty-five (55) acres of the east ninety (90) acres of the southwest quarter (SW) of section twenty (20), township forty-two (42) north, range eleven (11) east of the Third Principal Meridian, Cook County, Illinois, also known as Glenview Manor Subdivision, I do hereby covenant, undertake and agree to install and operate well and sewer as a general drainage improvement in every title and adjoining easement of the Village of Glenview has been constructed, as by the engineer, in adequate sewer water pumping plant to take care of all the flood water when upon said property, said pumping plant to consist of a centrifugal motor driven pump with necessary automatic controls, and well, tanks and auxiliary plant, and in a building of neat and substantial construction. The installation also includes all necessary mechanisms, diagram, wiring, fittings, piping and other items and appurtenances all necessary for a complete flood control or maintenance plant upon the tract.

I do further covenant, undertake and agree that so long as I remain the owner of said property I will cooperate, assist and pay, without objection all special assessments that may be levied prior to the year 2000 against said property for maintenance and storm water drainage improvement for the sewer and adjoining easements of the Village of Glenview, and that in the sale of said property, either directly through me or through any trustee who may acquire title to said property for purposes of sale or otherwise, I will include in every deed of conveyance, or agreement for deed of conveyance of any portion of said property, and make such trustee to include in every such deed of conveyance, or agreement for deed of conveyance of any portion of said property, an agreement covenant that such property is said subject to this undertaking and to other restrictions as follows:

(1) The land of Grantee(s) is in an express condition of this conveyance that the provisions herein described to be covered shall be subject to the provisions of the zoning ordinances of the Village of Glenview, Illinois.

(b). No building shall be erected or maintained on said lots less than the sixty in height and parking in the conversation lots than ten thousand dollars ($10,000.00) (Necessary garage, barn and outhouses incidental to main building excepted).

(c). It is an express condition of this conveyance that said second party is in all respects subject to and bound by a certain written undertaking of William K. Hoop, dated September 12th, 1972, and filed with the Village Clerk of the Village of Glenview, Illinois, wherein William K. Hoop, and his assigns,

agree to approve, accept and pay, without objection, such special assessments as may be levied prior to the year 1938 against said property for the sanitary and storm water drainage improvement of this and adjoining sections of the Village of Winnetka, Illinois.

The foregoing restrictions and conditions designated 'a,' 'b' and 'c' are understood by the parties hereto and shall be construed as covenants running with the land herein conveyed.'

(In the Agreement for a Deed of Conveyance.) 'It is further agreed by and between the parties hereto that the deed of conveyance herein provided to be executed and delivered by the first party (William H. Hoops or his assigns) to the second party (purchaser) upon the performance of the conditions herein set forth, shall contain the following restrictions, which should be construed as covenants running with the land:

a. (Same as 'a' above.)
b. (Same as 'b' above.)
c. (Same as 'c' above.)

This undertaking shall be binding alike on the heirs, executors, administrators and assigns of said William H. Hoops."

The decree, following the master's conclusions and recommendations, finds that the foregoing agreement or covenant was inspected by Robert V. Jones, one of the complainants, who had notice and full knowledge of its contents and was therefore bound by the terms thereof and would be bound to approve, accept and pay, without objection, all special assessments that might be levied prior to the year 1938 against the property in question for sanitary and storm water drainage improvements; that the said agreement constitutes a cloud upon the title to the premises which defendant had not removed at the time of the tender to it by complainants of the amount due under the terms of the contract for purchase; that complainants were not in default under the agreement, but tendered the amount due thereunder and were entitled to a deed conveying a good and merchantable title to the premises and also to a policy guaranteeing such title; that the tender was made in sufficient time to enable defendant to remove the objectionable covenant prior to the filing of the bill of complaint, and that there is no proof in the record that the Chicago Title & Trust Company was willing to waive the objection and issue its policy.

Defendant insists, and in fact the major portion of its brief is devoted to the contention that the Hoops agreement was personal in its nature and not a covenant running with the land; that it did not

impair the title which defendant agreed to deliver and tendered to complainants; that there was no legal justification for rescinding the contract on account of the covenant; and it is earnestly argued that the court must determine whether or not the property is subject to the Hoops agreement, and if it is not, to hold that there was an unwarranted rescission under which complainants would not be entitled to recover the sums paid on account of the purchase price.

As a prelude to this argument, defendant's counsel concedes that "it is often difficult to determine whether a covenant of a party to a contract is a covenant running with the land," and in view of the difficulty had by the court in the leading case of Purvis v. Shuman, 273 Ill. 286, in harmonizing the various decisions on the subject, originating in Spencer's case, 5 Coke 16 (1 Smith's L. C. 145), we can readily agree with counsel. However, we are not called upon to adjudicate the rights of the parties under the Hoops agreement, and in fact we could not do so as against adverse claimants unless they were made parties to this proceeding. Whatever views the court may have entertained as to the covenant, it is sufficient to say that the doubtful import of its character, as indicated by the sharp difference of opinion entertained by the parties hereto as to its effect, fully justified complainants in rescinding the sales agreement because of their reluctance to take a title burdened with a possible defect, the legal status of which could be settled only by subsequent litigation. Complainants contracted for a conveyance "in fee simple by a good and sufficient trustee's deed." The title offered them by defendant was not such as was called for. Since the court had no means of binding adverse claimants to any construction it may have deemed proper to place upon the Hoops agreement, or of indemnifying complainants, if its opinion supporting the title should turn out not to be well founded, complainants would have been left with a doubtful

impede the title which defendants argued to defeat and hindered to complainants; that there was no legal justification for restraining the defendant on account of the pavement; and it is unnecessary except that the court must determine whether or not the property in dispute is the Dorpe property, and if it is so, is held that there was no unauthorized encroachment upon which complainants could not be entitled to recover the same just on account of the previous grave.

In a problem in this aggregate, defendant's counsel insisted that "it is after difficult to determine whether a personal of a party to a contract is a personal property (the land) and the view of the difficulty had by the court in the decision case of Cooper v. Cooper, 27 Ill. 488, in determining the various decisions on the subject, originated in Commonly case, 2 Coke 32 Leiden's C. C. Lady, we can readily agree with counsel. However, we are not called upon to adjudicate the rights of the parties under the Dorpe agreement, and in fact we could not do so on against strange claimants unless they were made parties to this proceeding. Whatever view the court may have entertained as to the pavement, it is sufficient to say that the controlling issues of the character, as indicated by the sharp difference of opinion concerning by the parties hereto as to its effect, that judicial complaints in requiring the entire agreement between of their rights in lieu a title burdened with a possible defect, the legal status of which could be settled only by subsequent litigation. Complainants instituted for a mandamus "in the alleg by a good and sufficient bond." The bill alleged that by defendants was not such as was called for. Since the court had no cause of binding interior claimants to any construction it may have chosen proper to place upon the Dorpe agreement, or of identifying complainants, if the opinion upholding the title should have one not to be well founded, complainants would have been left with a doubtful

title. In this situation they were justified in refusing to accept the same and in filing their complaint for the recovery of money theretofore paid. There is abundant authority to support this conclusion. In Firebaugh v. Wittemberg, 309 Ill. 536, it is said: (p. 541)

"An agreement to sell and convey land is in legal effect an agreement to make a good title * * *. That would be so even if there were no contract or any covenant of warranty."

Maupin on Marketable Title, p. 712, contains the following discussion on the subject:

"A title is doubtful 'where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the court holds the conclusion it arrives at to be open to reasonable doubt in some other court. Generally, it may be said that the opinion of the court upon any question of law on which the title depends, will not render the title marketable if the court thinks that another judge or other competent person might entertain a different opinion upon the same question. The test as to whether a title is doubtful or not upon a question of law, has been held to be the certain conviction of the court, in deciding the point, that no other judge would take a different view.'"

(p. 721) "One of the principal reasons for the rule that a purchaser cannot be compelled to take a doubtful title, is that the decree of the court is not binding upon those whose rights in the premises give rise to the doubts of which the purchaser complains, they not being parties to the suit for the specific performance. They might raise the same question in a new proceeding, and a different court with different lights upon the subject might pronounce a judgment subversive of the title which the purchaser was compelled to take. * * * It would be unjust to compel a purchaser to take a title dependent upon a doubtful question of fact, when the facts presented might be changed upon a new inquiry."

In Street v. French, 147 Ill. 342, it was said: (p. 355)

"A doubtful title which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubts, but includes also a title which although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded; * * *."

That defendant had ample opportunity and time within which to remove the defect is fully sustained by the record. Several conferences were had between the parties between December, 1932, and March, 1933. Complainants twice tendered the balance remaining

due under their contract, and both times defendant offered them an insufficient deed and a policy lacking the required guarantee "against loss or damage by reason of defects in the title of grantor." Evidently the Chicago Title & Trust Company refused to waive the Koops covenant and issue a policy subject only to the items stipulated in the contract of sale. It was incumbent upon defendant to cure the defect and tender complainants a merchantable title. Sufficient time elapsed for that purpose, and, having failed, complainants were not obliged to carry on negotiations any longer. They were then warranted in rescinding the contract and recovering the sum paid by them on account thereof. Any other conclusion would produce the inequitable result of depriving complainants, not only of the property which they agreed to purchase, but also the sums paid by them on account of the purchase price.

For the reasons stated, the decree of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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38194

WILLIAM HANDEL, Appellee, v. I. D. OPAT, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

283 I.A. 644

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case to recover damages for injuries alleged to have been suffered by reason of the publication by defendant of certain libelous matter contained in a letter to one Agnes Devlin. Pursuant to an ex parte hearing, judgment was entered by default for $1,000 against defendant. Within thirty days thereafter defendant, as attorney pro se, presented a verified petition to vacate the judgment, and later by his attorney filed an amended petition incorporating substantially the allegations of the original petition. From the refusal of the court to vacate the judgment, defendant prosecutes this appeal.

The pleadings consist of a declaration, to which a demurrer was filed and overruled. Thereafter, defendant pleaded the general issue. No similiter was filed by plaintiff.

It appears from the record that the judgment was entered October 10, 1934. October 23, 1934, defendant, as attorney pro se, presented his motion to vacate the judgment, supported by verified petition, which was later amended on October 22, 1934, and alleged in substance that three suits had previously been instituted against defendant in the circuit court of Cook county, being Nos. B-272393, B-272396 and B-272397; that defendant was at that time financially

unable to employ counsel and therefore filed his appearance in each case, pro se, and conducted his defense to the best of his ability; that he proceeded to the office of the clerk of the circuit court three weeks before the judgment was rendered in this case, and was told by one of the clerks that his case would not be reached for some time, since the court was calling about ten cases daily and that defendant relied upon this information; that this cause was assigned to calendar No. 1 being heard by Judge Joseph Burke, who on September 17, 1934, called fifteen cases. The following day he called thirteen cases, and on October 10, 1934, 80 cases; that On September 26, 1934, defendant became seriously ill with an infected arm, and consulted Dr. J. A. Graham at Henrotin Hospital; that on October 6, 1934, he had an X-ray and diagnosis made at the hospital, and on October 8, 1934, was informed by Dr. Graham to prepare for an operation at an early date; that on the morning of October 10, 1934, while still ill, defendant again proceeded to the office of the clerk of the circuit court and asked for the file in case B-272393, but was unable to procure the same, it having been mislaid; that when it was finally located he examined the docket as to the other cases against him and found that one of them had been assigned to Judge Trude; that he then searched for these files until noon of that day and then proceeded to Judge Burke's court room and found that the two cases assigned to that court had been called, nonsuit having been taken in case B-272393, and judgment in this proceeding (B-272397); that defendant had an operation at Henrotin Hospital on October 13, and on that day caused notice to be served on plaintiff's attorney that he would move to set aside the judgment on October 15, and authorized one Rose Mandel to appear and present the motion on his behalf; that Judge Burke instructed Rose Mandel that defendant had about twenty days more to present a motion to vacate, and since she was not an attorney suggested that she withdraw the

unable to retain counsel and therefore filed his appearance in each case, pro se, and conducted his defense to the best of his ability; that he presented in the office of the clerk of the circuit court three works before the judgment was rendered in this case, and was told by one of the clerks that his case would not be reached for some time, since the court was calling their cases fully and that defendant relied upon this information; that this cause was assigned to calendar No. 1 being heard by Judge Joseph Burke, on September 17, 1934, called fifteen cases. The following day he called thirteen cases, and on October 16, 1934, he ceased that he judgment in 1934, defendant present personally and with an interpreter and, and considered Mr. Z. Zeidman as Jewish interpreter; that on October 6, 1934, he had an interview and disagreement with an interpreter, and on October 8, 1934, was informed by Mr. Zeidman to prepare for an operation on an only daughter who was suffering of Bright's disease; that while still in court and right presented in the office of the circuit court and asked the one file in case Z-17270, but was unable to produce the same, it having been mislaid; that when it was finally located he examined the docket on to the other cases and first file and found that one of them had been assigned to Judge Brady; that he then proceeded for three files until noon of that day and then proceeded to Judge Burke's court room and found that the two cases assigned to that court had been called, counsel having been in case Z-17270, and judgment in this proceeding (Z-17270) that defendant had an operation at Kankakee hospital on October 16, and on that ay counsel moved to be moved on plaintiff's attorney that he could move in and while the judgment on October 18, and authorized one Jos. Zeidman to appear and present the motion on the ground that Judge Burke improperly had ORDERED THAT defendant had about twenty days more to present a motion to vacate, and since she was not an attorney suggested that she withdraw the

motion and allow defendant later to appear for himself. The petition avers that defendant had a complete defense to the whole of plaintiff's cause of action, inasmuch as he did not at any time compose, publish, dictate, write or mail to Agnes Devlin any defamatory letter concerning plaintiff. There was appended to the petition the affidavit of Dr. J. A. Graham, stating that defendant came to him on October 6, 1934, for medical diagnosis and treatment, and that between October 6th and 13th defendant was in very poor health and had been advised to take a complete rest from business cares; that on October 8, 1934, diagnosis of defendant's ailment was completed, and on October 13th, 1934, an operation was performed by Dr. Graham.

Plaintiff filed an answer to the original petition November 3, 1934. December 1, 1934, a hearing was had on the merits of the petition and answer, and in the course of the proceeding the trial judge directed defendant to pay plaintiff $100 in cash within five days for his expenses and attorney's fees. December 6, 1934, the court was informed that defendant was willing to pay the $100, but was financially unable to do so, and offering to indorse notes in said sum, which the court refused to consider. January 10, 1935, the court denied defendant's motion to vacate the judgment because of his failure to pay the $100.

February 8, 1935, defendant presented a petition to vacate the order of January 10, 1935, on the ground of newly discovered evidence, supported by the affidavit of Rose Mandel to the effect that the alleged libelous letter set forth in the declaration was dictated by one Meyer Goldstein and typed by her while acting as Goldstein's stenographer; that the letter was delivered to Goldstein, who paid her for writing it, and was not written under the direction or with the knowledge of defendant. Morris J. Drezner, an attorney, argued the motion before the court on February 18, 1935, but the court denied the same. Thereafter, January 21, 1935, a capias ad satisfaciendum was issued.

mailing and which informant later is alleged had admitted. The petition says that Plaintiff has a complete defense in the claim of plaintiff's cause of action, inasmuch as he did not at any time received, publish, distribute, write or mail to Jones Davis any defamatory letter concerning plaintiff. There was appended to the petition the affidavit of Dr. J. A. Graham, stating that defendant came to him on October 6, 1934, for medical diagnosis and treatment, and that between October 6th and 12th defendant was in very poor health and had been advised to take a complete rest from business cares; that on October 8, 1934, stenographic of defendant's albums was employed, and on October 11th, 1934, an operation was performed by Dr. Graham.

Plaintiff filed an answer to the original petition November 2, 1934. November 1, 1934, a hearing was had on the merits of the petition and answer, and in the course of the proceeding the trial judge directed defendant to pay plaintiff $100 in cash within five days for his expenses and attorney's fees. November 6, 1934, the court was informed that defendant was willing to pay the $100, but was financially unable to do so, and efforts to induce notes in said sum, which the court refused to consider. January 10, 1935, the court denied defendant's motion to vacate the judgment because of his failure to pay the $100.

February 8, 1935, defendant presented a petition to vacate the order of January 10, 1935, on the ground of newly discovered evidence, supported by the affidavit of Ross Mendel to the effect that the alleged libelous letter not found in the deductions was dictated by one Mayor Johnston and typed by her while acting as Goldstein's stenographer; that the letter was delivered to Goldstein, who paid her for writing it, and she not written under the direction or with the knowledge of defendant. Mertle L. Brenner, an attorney, argued the motion before the court on February 18, 1935, but the court denied the same. Thereafter, January 23, 1935, a capias ad satisfaciendum was issued.

Upon this record the principal question involved is whether the court erred in not vacating the judgment. The law is well settled that courts should be liberal in setting aside defaults at the term at which they are entered, where it appears that reasonable diligence is shown, that the defendant has a meritorious defense and where justice will be promoted thereby. (Mason v. McNamara, 57 Ill. 274.) In the early case of Waugh v. Cuter, 3 Ill. App. 271, it was said (p. 275):

"In applications to set aside default, we regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is evidently unjust, a certain degree of neglect may, especially as terms can be imposed, be held to be excusable. Freeman on Judgments, sections 114, 541."

In Allen v. Hoffman, 12 Ill. App. 573, upon facts similar to these, the court said: (p. 576)

"Allen's attorney might doubtless have exercised a higher degree of diligence in ascertaining the situation of his case. * * But he was not bound to show the highest degree of diligence, his motion to set aside the default having been made at the same term at which the default was entered. All he was bound to show was a good and meritorious defense, and the exercise on his part of reasonable and ordinary care and diligence."

Dunlap v. Gregory, 14 Ill. App. 601, Hogan v. Armovick, 335 Ill. 181, and Gibbons v. Grossman, 195 Ill. App. 242, are to the same effect.

In Hogan v. Armovick, supra, the court aptly stated that (p. 183):

"While it is highly commendable to dispose of causes with celerity and dispatch it is more important that justice be done, and where for any good reason a defendant has been unable to present his defense, a court of law will set aside a judgment obtained ex parte and order a new trial." (Citing McMurray v. Peabody Coal Co., 281 Ill. 218; City of Moline v. C. B. & Q. R. R. Co., 262 Ill. 52, and Mason v. McNamara, 57 Ill. 274.)

We think defendant showed reasonable diligence, and under the circumstances did all that could be expected of him to have the judgment vacated. The allegations of his petitions, if established by competent evidence, would constitute a sufficient defense to the action. Having shown both diligence and that he has a meritorious defense, the court, in harmony with the established rule, should have vacated the judgment and afforded him an opportunity to interpose his defense.

In Drinkwater v. Davidson, 90 Ill. App. 9, the trial court

Upon this ground the principal question involved in another the court erred in not vacating the judgment. The law is well settled that courts should be liberal in setting aside default at the term at which they are rendered, where it appears that plaintiff's allegations in above, that the defendant has a meritorious defense and does plead will be promoted thereby. (Mason v. Hammond, 97 Ill. 271.) In the early case of Gough v. Smith, 3 Ill. App. 271, it was said: (p. 274):

"In applications to set aside default, or to vacate the judgment of a municipal division, it is sufficient for mere inspection of the proceedings, and where the judgment is erroneously unjust, a decision favorable to the party, especially as being not to ignorant, is usually in accordance with the ends of justice. Proceed on judgment, decision Ill., 201."

In Allen v. Hoffman, 12 Ill. App. 272, upon facts similar to those, the court said: (p. 275)

"Allen's attorney also contends here constitute a higher degree of diligence in ascertaining the plaintiffs of his case. But he was not bound to show the highest degree of diligence, the question is not such, the default having been made at the term at which the default was entered. Ill. he was bound to show a good and meritorious defense, and the question on the part of reasonable and ordinary care and diligence."

Dunlap v. Bromley, 14 Ill. App. 601, Gogan v. Hutchinson, 245 Ill. 161, and Gilmore v. Freeman, 145 Ill. App. 242, are to the same effect.

In Kogan v. Kunstadt, supra, the court aptly stated that (p. 161):

"While it is highly commendable to diligence of counsel with entirely and diligence it is more important that justice be done, and where for any good reason a default has been vacated to present his defense, a court of law will not allow a judgment obtained on default and order a new trial." (citing Hunter v. Hunter, 1 Ill. App. 161; City of Dallas v. C. B. & Q. R. R. Co., 145 Ill. 99, and Gough v. Smith, 97 Ill. App.)

We think defendant showed reasonable diligence, and under the circumstances, did all that could be expected of him to have the judgment vacated. The allegations of his petition, if established by competent evidence, would constitute a sufficient defense to the action. During above term diligence and that he had a meritorious defense, the court, in harmony with the established rule, should have vacated the judgment and afforded him an opportunity to interpose his defense.

In Dunlap v. Bromley, 14 Ill. App. 6, the trial court

entered an order setting aside a default judgment upon condition that defendant should pay $10 attorney's fee. The reviewing court, in reversing the judgment, said:

> "We are of the opinion that the court, in refusing to vacate the judgment except on condition of the payment of $10.00 attorney's fees, exceeded the limit of reasonable discretion, and that the judgment should have been vacated."

In the instant case defendant manifested a willingness to pay $100, as directed by the court, but was financially unable to do so. We think the court exceeded its discretion in requiring the payment as a condition for vacating the judgment.

As additional ground for reversal, defendant contends that it was error for the court to proceed to trial and render judgment in the absence of defendant when no similiter to the plea of the general issue was on file. In view of our conclusion on the point heretofore discussed, we deem it unnecessary to consider this question.

For the reasons stated the judgment of the circuit court will be reversed and the cause remanded with directions that defendant be allowed to interpose his defense in a trial upon the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

entered on other written order of trial judgment upon condition that defendant should pay the attorney's fees. The reviewing court, in reversing the judgment, said:

"In view of the opinion that the court, in refusing to vacate the judgment, acted on consideration of the payment of fifteen dollars, exceeded the limit of reasonable discretion, and that the judgment should have been vacated."

In the instant case defendant manifestes a willingness to pay fees as directed by the court, but was financially unable so to do. To take the case exceeded its discretion in requiring the payment as a condition for vacating the judgment.

In additional grounds for reversal, defendant contends that if the error for the court to present to trial and result judgment in the absence of defendant when he complied to the plan of the criminal laws had no fair. In view of our conclusion on the point above discussed, we deem it unnecessary to consider this question.

For the reasons stated the judgments of the circuit court will be reversed and the cause remanded with directions that defendant be allowed to interpose his defense in a fair manner upon the merits.

REVERSED AND REMANDED, WITH DIRECTIONS.

Remmers, P. J., and Matchett, J., concur.

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THOMAS L. LEEDOM COMPANY, a corporation, Appellant, v. WM. SLATER, Jr., Inc., a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 644[1]

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court for $193.83, being a balance alleged to be due for carpeting sold to defendant at its special instance and request. Defendant interposed no defense to the claim, but in place thereof filed a counterclaim alleging that it had previously purchased 215 yards of carpeting from plaintiff to be paid for when received, the carpeting to be installed by defendant in the foyer and lobby of defendant's theater; that after cutting, sewing and laying the carpeting it proved to be unfit for the purpose for which it was intended, whereupon defendant was compelled to remove and replace the carpet; that defendant's damage was $513.14, consisting of the purchase price of the new carpet, the freight for the delivery of same, and the cost and expense of taking up and removing the old carpet. The court entered judgment for defendant on its set-off, deducting from the amount claimed by defendant the amount of plaintiff's statement of claim and also the sum of $50 found to be the salvage value of the old carpet, which is now in possession of defendant. From this judgment plaintiff appeals.

The question presented for determination is whether defendant was entitled to maintain its counterclaim. It appears from the evidence that in September, 1933, defendant had determined to purchase

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the municipal court for $183.85, being a balance alleged to be due for carpeting sold to defendant at the special instance and request. Defendant interposed no defense to the claim, but in place thereof filed a counterclaim alleging that it had previously purchased 315 yards of carpeting from plaintiff to be paid for when received, the carpeting to be installed by defendant in the foyer and lobby of defendant's theater; that after cutting, sewing and laying the carpeting it proved to be unfit for the purpose for which it was intended, whereupon defendant was compelled to remove and replace the carpet; that defendant's damage was $813.14, consisting of the purchase price of the new carpet, the freight for the delivery of same, and the cost and expense of taking up and removing the old carpet. The court entered judgment for defendant on its set-off, deducting from the amount claimed by defendant the amount of plaintiff's statement of claim and also the sum of $30 found to be the salvage value of the old carpet, which is now in possession of defendant. From this judgment plaintiff appeals.

The question presented for determination is whether defendant was entitled to maintain its counterclaim. It appears from the evidence that in September, 1923, defendant had determined to purchase

carpeting to be laid in the foyer and lobby of its theater, known as the Davis Theater. Plaintiff's representative called on defendant for the purpose of securing the order. Defendant's representative apprised plaintiff's agent of the kind of carpet desired, and thereafter plaintiff delivered to defendant for its inspection four or five pieces of carpeting, 27" x 1 yard in size. These pieces were taken to the purchasing agent of the theater, who selected the carpet in question, and, as he testified, examined these pieces for color, design and quality. Thereafter defendant gave plaintiff an order for 250 yards of carpeting represented by the piece selected, which was delivered in Chicago September 21, 1933, and removed from the railroad warehouse by defendant and paid for in November, 1933. The carpet was laid in defendant's theater the same month. Some time thereafter, six or eight worn spots appeared in the carpet, varying in size from a quarter to a dime in dimension. Plaintiff's representative called at the theater to inspect the carpet after it had been laid, and testified that in his opinion the carpeting was "O.K.", as far as manufacture was concerned, stating that the worn spots were due either to mishandling by the layers of the carpet or by the janitor of the theater. Defendant's representative testified that the spots resulted from the removal of gum, or possibly the use of the "kicker", which is an instrument having numerous teeth which is used to stretch the carpet in laying.

Defendant evidently relies on sub-section 1 of section 15, chap. 121½, Uniform Sales Act, and on section 69 of the same chapter (Ill. State Bar Stats., 1935) to sustain the judgment of the court. Paragraph 1 of section 15 of the foregoing statute provides that where the buyer makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, that there is an implied warranty that the goods shall be reasonably fit for such purpose. It is conceded that plaintiff knew the intended use of the carpet when the order was

carpeting to be laid in the foyer and lobby of its theater, known as the Davis Theater. Plaintiff's representative called on defendant for the purpose of securing the order. Defendant's representative explained plaintiff's need of the kind of carpet desired, and thereafter plaintiff delivered to defendant for the inspection four or five pieces of carpeting, 27' x 2 yard in size. These pieces were taken to the purchasing agent of the theater, who selected the carpet in question, and, as he testified, examined these pieces for color, design and quality. Thereafter defendant gave plaintiff an order for 135 yards of carpeting represented by the piece selected, which was delivered to the Chicago Theater on [illegible], and removed from the railroad warehouse by defendant and paid for in November, 1928. The carpet was laid in defendant's theater the same month. Some time thereafter, six or eight very ugly spots appeared in the carpet, varying in size from a quarter to a dime in dimension. Plaintiff's representative called at the theater to inspect the carpet after it had been laid, and testified that in his opinion the carpeting was "G.K.", as far as manufacture was concerned, stating that the very ugly spots were due either to mishandling by the layers of the carpet or by the janitor of the theater. Defendant's representative testified that the spots resulted from the pouring of gum, or possibly the use of the "Zipper", which is an instrument during construction work which is used to strength the carpet in laying.

Defendant originally raised an anti-section 2 of section 12, chap. 121½, Jurat Jahr 1st, and on section 49 of the same chapter (121½, Ohio Bar Stat., 1910) to support the judgment of the court. Paragraph 2 of section 12 of the referred statute provides that where the buyer makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, that there is an implied warranty that the goods shall be reasonably fit for such purpose. It is conceded that plaintiff knew the intended use of the carpet when the order was

placed. However, in order to recover under this section of the statute it must also appear that the buyer relied on the seller's skill and judgment. The law is well settled that in order to recover under this section two elements must be shown, (1) that the seller know of the purpose for which the goods were bought, and (2) that the buyer relied on the seller's skill or judgment, and that if either one of these elements is lacking defendant cannot recover. In Etchler v. Kahnweiler, 178 N. Y. S. 257, the court, in holding against an implied warranty, said:

"So far as skill and knowledge of the goods are concerned, it would seem from the records that both parties were upon an equal footing as to the ability to judge the fitness of the lumber in question for the purposes for which it was intended, and there is nothing to show that the defendants in placing the order, were relying upon the seller's skill and judgment."

In Wasserstrom v. Cohn Frank & Co., 150 N. Y. S. 638, the same court in passing upon a claim growing out of an implied warranty for the sale of leather to be used in manufacturing shoes, said:

"So far as skill, knowledge and experience was concerned, the parties stood at the very least upon an equality if, indeed, defendant purchaser had not much wider experience and knowledge than plaintiff's salesman. In this regard, the case is much like Hight v. Bacon, 126 Mass. 10, wherein, under very similar circumstances, in a jurisdiction in which the rule of our Statute prevails, it was held that no implied warranty could be found."

In Davenport Ladder Co. v. Edward Hines Lumber Co., 43 Fed. (2nd) 63, it was said:

"The raising of an implied warranty of fitness depends upon whether the buyer informed the seller of the circumstances and conditions which necessitated the purchase of a certain character of article or material, and left it to the seller to select the particular kind and quality of article suitable for the buyer's use."

In addition to the authorities cited, the Uniform Sales Act contains the following provision (sub-section 3, section 15, chapter 121½, Illinois State Bar Statutes, 1935):

"If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

In the instant case defendant had the carpet cut, sewed and laid and had every opportunity of e amining its color, design and quality w

placed. However, in order to recover under this section of the statute it must also appear that the buyer relied on the seller's skill and judgment. The law is well settled that in order to recover under this section the elements must be shown, (1) that the seller knew of the purpose for which the goods were bought, and (2) that the buyer relied on the seller's skill or judgment, and this is of course one of these elements in reaching different results however. In Sheffer v. Commellini, 198 So. 2d. 607, the court, in holding against an implied warranty, said:

"So far as skill and knowledge of the parts are concerned, it would seem from the evidence that both parties were mistaken, relying on the ability to judge the fitness of the tractor in question for the purpose for which it was intended, and there is nothing to show that the defendants in selling the tractor, were relying upon the seller's skill and judgment."

In Hargraves v. Cohn Fruck & Co., 180 N. Y. S. 839, the same court in passing upon a claim arising out of an implied warranty for the sale of jewelry to be used in manufacturing shoes, said:

"So far as skill, knowledge and experience are concerned, the parties stood on the very same plane as regards it, inasmuch as defendant partnership had not much more experience and knowledge than plaintiff's witnesses. In this respect, the case is much like Hirst v. Jones, 104 Kan. 12, wherein, under very similar circumstances, in a purchasing in which the duty of the defendants was valid, it was held that no implied warranty could be found."

In Commercial Motor Co. v. Wheeler Motor Co., 43 Ind. (2nd) 63, it was said:

"The raising of an implied warranty of fitness depends upon whether the buyer informed the seller of the circumstances and conditions which necessitated the purchase of a certain commodity of article or material, and left it to the seller to select the particular kind and quality of article suitable for the buyer's use."

In addition to the subdivision cited, the Uniform Sales Act contains the following provision (sub-section 3, section 15, chapter 1214, Illinois Revised Statutes (1950)):

"If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

In the instant case defendant had the weight set, based and laid out and every opportunity of examining the safety, design and quality of

ascertain whether or not it conformed to the sample from which the selection was made.

Upon the hearing defendant's counsel was cautious in not using the word "sample" in the examination of witnesses or permitting them to use that word, and in fact he objected to the use thereof by plaintiff's counsel on cross-examination. It is clearly disclosed from the record, however, that defendant's representative examined the pieces submitted for color, design and quality, and after selecting the particular piece desired placed the order for 250 yards of carpeting. This constituted purchase by sample. Defendant's witnesses testified as experts on carpeting, and showed considerable knowledge on the subject, and there is nothing in the record to indicate that defendant relied on the seller's skill and judgment. In fact, the only fair conclusion to be reached is that defendant made its own selection as to color, design and quality, based upon the supposed knowledge which it had of this class of merchandise, and under the circumstances we think the necessary element entitling defendant to recover under paragraph 1 of section 15 of the Uniform Sales Act as defined by authorities was entirely lacking.

Whatever right to recover defendant had must be based on section 16 of the Act, which covers implied warranty of sale by sample. Defendant's conscious evasion of the use of the word "sample" throughout the trial is significant, for if this was a sale by sample defendant utterly failed to show that the goods were not up to sample, as they would be required to do under section 16 of the Uniform Sales Act.

The evidence as to the defects in the carpet is conflicting. It appears that shortly after the carpet was laid some eight spots of small dimension appeared thereon. Plaintiff contends that these were caused either by the careless use of "kickers" in stretching or laying the carpet, or by the improper removal of gum thrown on the floor by patrons of the theater. It is significant, however, that the noticeable

ascertain whether or not it conformed to the sample from which the selection was made.

Upon the hearing defendant's counsel was cautious in not using the word "sample" in the examination of witnesses or permitting them to use that word, and in fact he objected to the use thereof by plaintiff's counsel as cross-examination. It is clearly distinguished from the report, however, that defendant's representatives selected the places sampled for water, testing the quality, and after ascertaining the particular place desired the water for 600 yards of carpeting. This constitutes perhaps by sample. Defendant's witnesses testified to experience in judging, and stated substantially substantially as the subject, and there is evidence in the record to indicate that defendant relied on the seller's skill and judgment. In fact, the only fair conclusion to be reached is that defendant made the entire selection on its color, design and quality, based upon the exposed samples which it had of this class of merchandise, and under the circumstances in which the necessary element existing determine in Section under paragraph 2 of section 15 of the Uniform Sales Act as defined by authorities was entirely lacking.

Whatever right to recover defendant had must be based on section 16 of the act, which covers implied warranty of sale by sample. Defendant's conscious evasion of the use of the word "sample" throughout the trial is significant, for if this was a sale by sample defendant clearly failed to show that the goods were not up to sample, as they would be required to do under section 16 of the Uniform Sales Act.

The evidence as to the colors in the carpet is conflicting. It appears that shortly after the carpet was laid some light spots of small dimension appeared thereon. Plaintiff contends that these were caused either by the careless use of "Bakore" in scrubbing or laying the carpet, or by the improper removal of dye (stain) on the floor by persons of the theater. It is significant, however, that the noticeable

defects were limited to some eight particular spots, and that otherwise the carpet contained no defects.

Section 69 of the Uniform Sales Act provides four remedies for breach of warranty: (a) the purchaser can either accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of price; (b) he may accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; (c) he may refuse to accept the goods if the property therein has not passed and maintain an action against the seller for damages for the breach of warranty; or (d) he may rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. Under the evidence disclosed by the record, defendant's only possible remedies lie under paragraphs (b) and (d). From what we have said defendant could not recover under paragraph (b), because the evidence does not disclose a breach of warranty based on purchase by sample. As to paragraph (d), there is no contention that the contract was rescinded by defendant. All that defendant sought was an adjustment, and failing in that regard filed its counterclaim. Even if it be held that an attempt was made to rescind, which is not sustained by the record, the Uniform Sales Act provides that the buyer cannot rescind the sale if he knows of the breach of warranty when he accepts the goods, or if he fails to notify the seller within a reasonable time of his election to rescind, or if he fails to return or to offer to return the goods in substantially as good condition as they were in at the time the property was delivered to the buyer. Where goods are tendered in conformity with the contract of sale, and are not in compliance therewith, the buyer must return them within a reasonable time after he has discovered that they are not as called for by the contract. (M. Hommel Wine Co. v. Netter, 197 Ill. App. 382; Geneva Organ Co. v. Ambassador

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defects were limited to some slight particular spots, and that otherwise the cargo contained no defects.

Section 69 of the Uniform Sales Act provides that breaches of warranty: (a) the purchaser can either accept or reject the goods and set up against the seller the breach of warranty by way of recoupment in diminution or reduction of price; (b) in any action he keep the goods and maintain an action against the seller for damages for the breach of warranty; (c) he may return or offer to return the goods if the property therein has not passed and maintain an action against the seller for damages for the breach of warranty; or (d) in any case where the contract is sold or the sale and return to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. Under the evidence disclosed by the record, defendant's only possible remedies lie under paragraphs (b) and (d). From what we have said defendant could not recover under paragraph (b), because the evidence does not disclose a breach of warranty based on misrepresentation. As to paragraph (d), there is no contention that the contract was rescinded by defendant. All that defendant sought was an adjustment, and failing in that regard filed the counterclaim. Even if it be held that the account was sent in revoked, which is not contained by the record, the Uniform Sales Act provides that the buyer cannot revoke the sale if he knows of the breach of warranty when he accepts the goods, or if he fails to notify the seller within a reasonable time of his election to rescind, or if he fails to return or to offer to return the goods in substantially as good condition as they were in at the time the property was delivered to the buyer. Here goods are included in conformity with the contract of sale, and are not in condition therewith. The buyer must return them within a reasonable time after he has discovered that they are not as called for by the contract. (N. Comml. Ins. Co. v. Rotter, 124 Ill. App. 283; Sunny Brand Co. v. Schwenker

Theatres Corp., 249 Ill. App. 390.) It appears from defendant's exhibits in evidence that defendant claimed the carpet was not as warranted before it was laid in the month of November; nevertheless it allowed the carpet to be laid and remain on the floor for approximately four months, and it was not until plaintiff had filed suit that the counterclaim was interposed.

We are unable to ascertain upon what theory the court assessed the damages. Damages in cases of this kind must be based upon evidence showing the difference in the value of the goods as warranted and their actual value in the alleged defective condition. No such evidence was introduced, nor was there any attempt made to do so. The eight spots in the carpet did not render the entire 250 yards worthless; by recutting and resewing the carpet it still had considerable value.

We are of the opinion that this carpet was bought by sample, and that the parties were upon an equal footing as to their ability to judge the fitness of the carpet for the purpose for which it was intended, and that defendant in placing an order for the purchase of the same did not rely upon the seller's skill and judgment. Consequently, no case of breach of implied warranty of sale by sample was made, and defendant was not entitled to judgment on its counterclaim. Since no question was raised as to plaintiff's right to collect under its statement of claim, it is clearly entitled to judgment here.

For the reasons stated herein, the judgment of the Municipal court will be reversed and judgment entered here on plaintiff's statement of claim for $193.83 and costs.

REVERSED AND JUDGMENT HERE IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN THE SUM OF $193.83 AND COSTS.

Scanlan, P. J., and Sullivan, J., concur.

Thompson Co., 224 111. App. 390.) In appeals from defendant's motion in arrest of judgment, the output was not an warranted before it was laid in the month of November; warranties it allowed the output to be laid and remain on the floor for approximately four months, and it was not until plaintiff had filed suit that the counterclaim was interposed.

We are unable to ascertain upon what theory the court assessed the damages. Damages in case of this kind must be based upon evidence showing the difference in the value of the goods as warranted and their actual value in the alleged defective condition. No such evidence was introduced, nor was there any attempt made to do so. The slight specks in the output did not render the entire egg product worthless; by reassigning and treating the output it still had considerable value.

We are of the opinion that this output was bought by samples, and that the parties were upon an equal footing as to their ability to judge the fitness of the output for the purpose for which it was intended, and that defendant in placing an order for the purchase of the same did so only upon the buyer's skill and judgment. Consequently, no sale of brands of inferior warranty of sale by samples was made, and defendant was not entitled to judgment on its counterclaim. Since no question was raised as to plaintiff's right to collect under its statement of claim, it is clearly entitled to judgment here.

For the reasons above stated, the judgment of the municipal court will be reversed and judgment entered here on plaintiff's statement of claim for $182.05 and costs.

REVERSED AND JUDGMENT ENTERED HERE ON STATEMENT OF CLAIM FOR $182.05 AND COSTS.

Sullivan, P. J., and Gallagher, J., concur.

38233

MARTHA MOORE,
Appellee,

v.

FRANK W. BROWN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

283 I.A. 644

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action for malicious prosecution against defendant, Frank W. Brown, to recover damages alleged to have resulted from his action in suing out of the municipal court an attachment in aid writ against plaintiff's property. Trial was had by jury, resulting in a verdict and judgment for $500 in favor of plaintiff, from which this appeal is prosecuted.

Defendant is a practicing attorney at the Chicago bar, with offices in the Reaper Block. He was retained by plaintiff in the latter part of 1931 in connection with three suits, the first of which was a foreclosure, the second the probating of her mother's estate, and the last a partition suit. The sale in the partition suit was set for October 6, 1933, in the county building. On the date of the sale plaintiff called at defendant's office and with her daughter and defendant attended the sale together. Thereafter they returned to defendant's office in the Reaper Block, and a conversation ensued wherein plaintiff complained of defendant's conduct of the sale and refused to pay him the balance of his fee then due. Defendant stated that if his fee was not paid he would be obliged to bring suit, and plaintiff then said that it would do him no good because she was going to leave the state and take her property with her. Following this conversation, defendant

tried at various times to reach plaintiff over the telephone and in other ways, but was unable to get any response. He thereupon consulted several lawyers, who advised him that he had probable cause to sue out an attachment writ in aid, and advised him to do so. Accordingly, he filed suit against plaintiff in the municipal court, sued out an attachment in aid, and recovered judgment for $150 and costs, which remains unpaid. Feeling aggrieved at defendant's action, plaintiff instituted the present proceeding to recover damages alleged to have accrued by reason of the suing out of the attachment writ.

Defendant contends that he did not have a fair trial, and points out various instances showing the animosity of plaintiff's counsel, not only in the improper examination of witnesses but also on the arguments to the jury. In one instance plaintiff's counsel called one John Andrean, night foreman in the Reaper Block where defendant had his office The witness was asked what defendant's reputation was in the Reaper Block for truth and veracity. Defendant's counsel objected, and the objection was sustained by the court. Notwithstanding the court's ruling, plaintiff's counsel then called another witness, Paul G. Krehn, a deputy clerk of the municipal court, and inquired whether he knew defendant's reputation among the people in and about the municipal court for truth and veracity, to which defendant's counsel again objected and the objection was sustained.

In the course of the trial plaintiff's counsel asked one Alfred J. Griffin, also a deputy clerk in the municipal court, some questions relative to certain lost documents, and propounded this question: "Then, would you say that document has been lost or stolen from the file?" thereby implying, as defendant's counsel contends, that the defendant had stolen the document. An objection to the question was sustained by the court.

On the examination of Eleanor Moore, plaintiff's counsel asked whether she observed defendant's conduct in dealing with plaintiff, and

trial at various times to reach plaintiff over the telephone and in other ways, but was unable to get any response. Mr Sherstyen communicated several lawyers, who advised him that he had probable cause to sue out an attachment writ in aid, and advised him to do so. Accordingly, he filed suit against plaintiff in the municipal court, sued out an attachment in aid, and recovered judgment for $120 and costs, which remains unpaid. Testimony adduced at defendant's trial, plaintiff insisted the present proceeding to recover damages alleged to have accrued by reason of the suing out of the attachment writ.

Defendant contends that he did not have a fair trial, and points out various instances showing the animosity of plaintiff's counsel, not only in the improper examination of witnesses but also on the arguments to the jury. In one instance plaintiff's counsel called one Pam Ambrose, might foreman in the Depot Blood Bank [illegible] that his attitude The witness was asked what Ambrosi's occupation was in the Depot Blood for truth and veracity. Defendant's counsel objected, and the objection was sustained by the court. Notwithstanding the court's ruling, plaintiff's counsel then called another witness, Joel B. Erwin, a deputy clerk of the municipal court, and inquired whether he knew defendant's reputation among the people in and about the municipal court for truth and veracity, to which defendant's counsel again objected and the objection was sustained.

In the course of the trial plaintiff's counsel called one Alfred J. Griffin, also a deputy clerk in the municipal court, some questions relative to certain last documents, and propounded this question: "Does, would you say that document has been lost or stolen from the files?" Clearly implying, as defendant's counsel contends, that the defendant had stolen the document. An objection to the question was sustained by the court.

On the examination of Clement Moore, plaintiff's counsel asked whether the observed defendant's manner in dealing with plaintiff, and

what the nature of his conduct was. An objection to the question was sustained by the court. Notwithstanding the court's ruling, counsel asked what defendant's tone of voice was in talking to plaintiff, and again an objection to the question was sustained. Thereupon plaintiff's counsel, still persisting, asked the witness if defendant's conduct was rude and ungentlemanly, and an objection to that question was sustained. This line of questioning was pursued until the court advised plaintiff's counsel that defendant's conduct toward plaintiff was not an issue in the case.

In his opening argument to the jury, plaintiff's counsel made the following statement:

> "Frank W. Brown filed a false affidavit in this case and comes in here and testifies falsely to the evidence right in this court room. That reminds me of the story of the shyster who said: 'If you get indicted for perjury the thing to do is to swear out of it.'"

Defendant's counsel objected to the statement and asked to have it stricken from the record, but the court overruled the objection.

It appears that in the opening argument of plaintiff's counsel to the jury no reference was made to exemplary damages, but in his closing argument the question of exemplary damages was presented, and of course defendant had no opportunity thereafter to reply thereto. While it has been held largely discretionary with the court to permit the discussion of damages not referred to in the opening argument or in the reply thereto (Pittsburgh C. C. & St. L. Ry. Co. v. Bovard, 223 Ill. 176), the procedure was especially damaging to defendant in this case because the prejudicial remarks attributed to plaintiff's counsel were mostly made in the closing argument, and many of them related to exemplary damages. One of the statements shown by the record is as follows:

> "Gentlemen, exemplary damages are for the purpose of deterring and discouraging other people from doing likewise and taking that into consideration you have the right to consider the effect that a lawyer might have in a community in carrying on that kind of practice. The effect it might have on other lawyers. You know from your experience that ninety-nine lawyers can do good deeds and one lawyer comes along and exploits one woman that will cast a shadow over the good deeds the others have done."

what the nature of his conduct was. An objection to the question was sustained by the court. Notwithstanding the court's ruling, counsel asked what defendant's view of right was in talking to plaintiff, and again an objection to the question was sustained. Thereupon plaintiff's counsel, with particular, asked the witness if defendant's conduct was rude and uncourteously, and an objection to that question was sustained. This line of questioning was pursued until the court stated plaintiff's counsel that defendant's conduct toward plaintiff was not an issue in the case.

In his opening argument to the jury, plaintiff's counsel made the following statement:

"Frank G. Brown filed a false affidavit in his own and come in here and testifies falsely to the witness stand in this court room. That weighs on my view of the matter the only 'if you can initiated for paying the claim is he is an honest man or is.'"

Defendant's counsel objected to the statement and moved to have it stricken from the record, but the court overruled the objection.

It appears that in the opening argument of plaintiff's counsel to the jury no reference was made to exemplary damages, but in his closing argument the question of exemplary damages was presented, and counsel defendant had no opportunity thereafter to reply thereto. While it has been held largely discretionary with the court to permit the discussion of damages not referred to in the opening argument on the reply (Pittsburgh C. C. & St. L. Ry. Co. v. Bingle, 88 Ill. 176), the procedure was especially damaging to defendant in this case because the prejudicial remarks addressed to plaintiff's counsel were merely made in the closing argument, and many of them related to exemplary damages. One of the statements shown by the record is as follows:

"Gentlemen, exemplary damages are for the purpose of deterring and discouraging other people from doing likewise and taking that into consideration you have the right to consider the effect that a larger verdict here in a community in convicting on that kind of proceeding. The effect it might have on other lawyers. You want from your experience that minority-nine lawyers can do just about as much as lawyer whose client and explains the reason that will cause a change over the good there the others have done."

Defendant's counsel objected to the statement, whereupon the court ruled that plaintiff's counsel must confine his remarks to the evidence.

In another part of the closing argument plaintiff's counsel said:

"He knew where her property was, he knew her circumstances and what her plans were; he took care of all her business, he knew that affidavit was false from beginning to end and when a lawyer practicing law goes out and files a false affidavit against one of our citizens whom you saw here on the witness stand --."

Counsel objected to the statement, but the court overruled the same. Plaintiff's attorney then persisted in that line of argument, by continuing as follows:

"I hope you will take into consideration that there are other women; other widows and orphans who must rely upon lawyers."

Objection to this statement was sustained by the court; nevertheless, counsel continued:

"If a widow from one of your families and never had the experience --."

Objection was made to the statement, but the court overruled the same, saying, "The plaintiff in this case is a widow, go ahead," and thereupon plaintiff's counsel continued:

"If a widow from your own family had gone to a lawyer which may be probable some day, would you want her to call on that kind of a person, that Frank Brown is?"

Objection to the foregoing statement was sustained by the court as being improper, but counsel persisted in that line of argument, and said:

"Would you feel that any widow in Mrs. Moore's position, as Mrs. Moore is herself, who had been trapped by a person like Mr. Brown --."

The court sustained an objection to the last statement. Plaintiff's counsel then said:

"If such a person as Mrs. Moore, who has had a false affidavit for the purpose of entrapping her and exploiting her and taking from her and causing her mental suffering and taking from her the last bit of money she had --."

An objection to this statement was overruled by the court.

In concluding his argument to the jury, plaintiff's attorney said:

Defendant's counsel objected to the statement, whereupon the court ruled that plaintiff's counsel must confine his remarks to the evidence.

In another part of the closing argument plaintiff's counsel said:

"He knew where for property was, he knew her circumstances and what her plans were; he took note of all her business, he knew that affidavit was false from beginning to end and when a lawyer practicing law goes out and takes a false affidavit against one of our citizens whom you see here on the witness stand --."

Counsel objected to the statement, but the court overruled the same.

Plaintiff's attorney then persisted in that line of argument, by continuing as follows:

"I hope you will take into consideration that there are other women, also widows and orphans who must rely upon lawyers."

Objection to this statement was sustained by the court; nevertheless, counsel continued:

"If a widow from one of your families had never had the experience --."

Objection was made to the statement, but the court overruled the same, saying: "The plaintiff in this case is a widow, go ahead." and thereupon plaintiff's counsel continued:

"If a widow from your own family had been in a larger trial may be probably same day, would you care but to call on that side of a person, that Trunk Brown law?"

Objection to the foregoing statement was sustained by the court on ruling improper, but counsel persisted in that line of argument, and said:

"Could you feel that any widow in Mrs. Moore's position, as Mrs. Moore is herself, who has been assaulted by a person like Mr. Brown --."

The court sustained an objection to the last statement. Plaintiff's counsel then said:

"If such a person as Mr. Moore, who has as a false affidavit for the purpose of entrapping her and exploiting her and taking from her and causing her mental suffering and taking from her the last bit of money she had --."

No objection to this statement was presented by the court.

In concluding his argument to the jury, plaintiff's attorney said:

"Take the testimony of defendant into consideration, with his sneering, clever manner, cunning, sly and evasive and on the other hand, the quiet Mrs. Moore."

The court overruled an objection to the statement, and thereupon plaintiff's counsel continued:

"Take into consideration the same lady, the inexperienced Mrs. Moore, on the witness stand, talking in a quiet tone of voice here, one of the few times in her life when she happened to come to this court room and is a witness here, which one would be the most likely to be telling the truth, she or Mr. Brown?

Where complaint has been made of counsel's conduct in the trial of a case, courts have scrupulously scanned the evidence to determine whether the effect produced upon the jury has been prejudicial to the rights of parties litigant, and have not hesitated to reverse cases where it appeared that one of the parties was deprived of a fair trial, either by reason of the conduct of counsel in the examination of witnesses or by improper remarks made to the jury. (Stanton v. Chicago City Ry. Co., 188 Ill. App. 502; Chicago Union Traction Co. v. Faurot, 136 Ill. App. 347; Wallin v. Mitchell, 200 Ill. App. 324; Odett v. Chicago City Ry. Co., 166 Ill. App. 270; and Eshelman v. Rawalt, 298 Ill. 192.)

It is clear that the persistence of counsel in propounding improper questions after the court had ruled adversely, and that the arguments made to the jury were prejudicial and calculated to inflame the jury against defendant. A verdict procured in that manner should be promptly set aside. We think the contention of defendant that he did not have a fair trial is abundantly shown by the record, as indicated by some one of the instances hereinabove cited.

Defendant's brief urges eight other grounds for reversal, but inasmuch as this cause will have to be retried, we consider it unnecessary to discuss the other grounds.

The judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

"Into the testimony of defendant Jack Constantinides, with his assaulting, clever manner, complete, dry and evasive and on the other hand, the quiet Mrs. Steve."

The court overruled an objection to the statement, and thereupon plaintiff's counsel continued:

"Take into consideration the same lady, the temperamental Mrs. Steve, on the witness stand, talking in a quiet tone of voice and then, one of the times in her life when she happened to come to this court room and in a private room, with one which by the most liberal to be called the truth, she at Mr. Stewart

These complaints are based upon of counsel's conduct in the trial of a case, courts have correctly stated the criterion to determine whether the effect produced upon the jury has been prejudicial to the rights of petitioner litigant, and have not hesitated to reverse cases where it appeared that one of the parties was injured of a fair trial, either by reason of the conduct of counsel in the examination of witnesses or by improper remarks made to the jury. (Lindsay v. Pacific Elec. Ry. Co., 188 Cal. App. 808; Chicago Union Traction Co. v. Durant, 139 Ill. 329, 347; Tullis v. Kingsbury, 80 Ill. 499, 506; Davis v. Kansas City Ry. Co., 180 Ill. App. 478; and Lehrman v. Powell, 298 Ill. 132.)

It is clear that the persistence of counsel in propounding improper questions after the court had ruled adversely, and that the arguments made to the jury were prejudicial and calculated to inflame the jury against defendant. A verdict procured in that manner should be promptly set aside. In which the consideration of defendant that he did not have a fair trial is sufficiently shown by the record, as indicated by some one of the instances hereinabove cited.

Defendant's brief makes eight other grounds for reversal, but inasmuch as this cause will have to be retried, we consider it unnecessary to discuss the other grounds.

The judgment of the municipal court is reversed and the cause remanded.

HAMMER and TEMPLETON,

Concur. P. J., and concurrence, J., concur.

38254

CLARIBEL BURGITTOM, Appellee, v. CRANE COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY. 283 I.A. 644

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case to recover damages for injuries alleged to have resulted from the negligent operation of defendant's automobile by its agent. The accident occurred in the afternoon of July 23, 1933, at the intersection of Granville and Winthrop avenues, Chicago. Plaintiff had just emerged from a drug store on the southwest corner of the intersecting streets, and was walking north on Winthrop avenue. While crossing Granville avenue she passed a Yellow cab parked in front of the drug store, facing east, and was struck by defendant's car, which was then proceeding in an easterly direction, and was severely injured. Trial was had by a jury, resulting in a verdict and judgment for $4,700 against defendant, from which it appeals.

It is urged, among other grounds, that the court's remarks constitute prejudicial error. During the examination of William J. Pick, driver of defendant's car and the only eyewitness to the accident, called on behalf of defendant, the following colloquy ensued:

"Q. Now, tell us first what part of the car came in contact with the plaintiff?

A. It was the part of the car that would be back of the --

The Court: Can't you tell us the part of the car without singing a song every time?

The Witness: The forepart of the car, on the right hand side.

Mr. Latham: Now, I am going to ask you again: Where was your car with reference to the passageway for pedestrians crossing Granville on the west side of Winthrop, when you first noticed the plaintiff?

Mr. Krohn: I object to that. He has answered that. He said he was four or five feet east of that.

The Court: I don't know whether he has or not. He has talked so much and didn't say anything, I don't know what he has said. Let him answer it. Do you understand the question?"

Exceptions were taken to these remarks as having prejudicialinfluence on the jury.

Plaintiff's counsel seek to minimize the effect of the court's attitude as reflected in its remarks, by saying that they were isolated instances and therefore could not have prejudiced the jury against defendant. However, Pick was defendant's principal witness and the only eyewitness called on its behalf. His testimony was of vital importance to the defense. While the court may not have intentionally sought to discredit the witness's statements, the effect of the remarks was to convey to the jury the impression that the witness talked too much and said nothing and also to cast ridicule upon him. It is generally known that in the trial of law suits, particularly in a case of this kind where the issues are close and the evidence conflicting, juries observe the demeanor of the court throughout the trial, and any indication by the court as to the weight to be accorded to the testimony of an important witness may have considerable influence with the jury. Expressions of displeasure with an important witness are likely to be prejudicial and are a violation of the rule repeatedly laid down that the trial judge should maintain an attitude of complete fairness and not indicate to the jury any hostility toward, or lack of confidence in, a witness appearing on the stand. (Fish v. Ryan, 88 Ill. App. 524; People v. Hill, 56 N. Y. S. 232.)

In People v. Hill, supra, it was said that:

"A party to an action is entitled to a determination of the jury on the question of the credibility of witnesses not influenced by the opinion of the court."

The witness: The forepart of the coat, on the right hand side.

Mr. Jackson: Now, I do not ask you special where was your reference to the photography for prosecution purposes Murphy, on the week ends of January, when you first noticed the plaintiff?

Mr. Kraus: I object to that. He has answered that. He said he was four or five feet back of that.

The Court: I don't know whether he can or not. He has spoken so much and didn't say anything. I don't know what to do with it. Let him answer it. Do you understand the question?

Witnesses were called to show results on boring prejudicial comments on the jury.

Plaintiff's counsel seek to minimize the effect of the court's attitude as reflected in its remarks, by stating that they were isolated incidents and therefore could not have prejudiced the jury against defendant. However, that was defendant's principal witness and the only eyewitness called on its behalf. His testimony was of vital importance to the defense. While the court may not have intentionally sought to discredit the witness's testimony, the effect of the remarks was to convey to the jury the impression that the witness failed too much of full candor and give to some jaundice upon him. It is generally known that in the trial of law suits, particularly in a case of this kind where the issues are close and the evidence conflicting, jurors observe the demeanor of the court throughout the trial, and any indication by the court as to the weight to be accorded to the testimony of an important witness may have consequences fatal to the cause of the party. Expressions of displeasure with an important witness are likely to be prejudicial and are a violation of the rule repeatedly laid down that the trial judge should maintain an judicial attitude and not intimate to the jury his opinion of controlling questions of fact or credibility of witnesses or material evidence.

Dunn on Ill. Cpc. citing Jacobs v. Ill. R.R. 94 N. Y. 1. 201;

In Jacobs v. Ill. R.R. Supra, it was said that:

"A party is as entitled to a disinterested tribunal of the jury on the question of the credibility of witnesses as to the judgment of the court."

In State v. Rogers, 173 N. C. 755, it was held prejudicial error for the court during the examination of the defendant to say: "Answer yes or no, and don't be dodging."

We think the effect produced on the jury by the remarks in this proceeding might well have prejudiced them against Dick and have tended to discredit his testimony. The circumstances of this case, where, as stated heretofore, the issues were close, the evidence conflicting and defendant's principal witness was the subject of the remarks, rendered the incident of more than ordinary importance to the defense.

It is also urged that plaintiff was not in the exercise of ordinary care and caution for her own safety at and prior to the time of the accident, and that in the absence of wilful and wanton negligence plaintiff would not be entitled to recover unless she produced evidence showing due care on her part, and it is urged that the court should accordingly have directed a verdict for defendant. Inasmuch as this cause will have to be retried, we refrain from commenting on the evidence.

For the reasons stated herein, the judgment of the Superior court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

In Ellis v. Rogers, 179 N. C. 700, it was held prejudicial error for the trial judge to instruct the defendant to say "answer yes or no, and don't be dodging."

We think the effect produced on the jury by the remarks in this proceeding might well have prejudiced the minds of the and have lended to discredit his testimony. The circumstances of this case, where, as stated heretofore, the issues were clear, the evidence conflicting and defendant's principal witness was the subject of the remarks, rendered the incident of more than ordinary importance in the defense.

It is also urged that plaintiff was not in the exercise of ordinary care and caution for her own safety at and prior to the time of the accident, and that in the absence of willful and wanton negligence plaintiff would not be entitled to recover unless the contested evidence showing the care on her part, and it is urged that the court should accordingly have directed a verdict for defendant. Inasmuch as this cause will have to be tried, we refrain from commenting on the evidence.

For the reasons stated herein, the judgment of the superior court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Connor, J., and Hoke, J., concur.

38261

DAN LONGO,
Appellee,

v.

MOULDING-BROWNELL CORPORATION,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

283 I.A. 644

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action at law to recover for work performed and also for damages resulting from the breach of a written contract with defendant. Trial was had by jury, resulting in a verdict and judgment for plaintiff of $5,323.31, from which defendant appeals.

The essential facts disclose that in 1934 the Sanitary District of Chicago constructed an intercepting sewer along the Chicago & Western Indiana railroad tracks, near the southern boundary of the city, and engaged S. A. Healy Company as its general contractor. Moulding-Brownell Corporation, defendant herein, was employed as a subcontractor and entered into a written agreement with plaintiff whereby he was to remove and haul approximately 34,000 cubic yards of dirt from the tunnels wherein the intercepting sewer was being laid. For this work plaintiff was to receive 38¢ per cubic yard, the engineer's estimate to govern yardage as a basis for payment. Plaintiff performed work and hauled dirt under his contract from June 22, 1934, to September 15, 1934, when he was summarily discharged by defendant. Up to the date of the termination of the agreement he had removed and hauled 11,123.8 cubic yards of dirt, for which he was entitled to receive 33¢ per

cubic yard, a total of $4,227.04. He had been paid on account $2,591, leaving a balance then due of $1,636.04. There is no dispute as to this item.

The controversy arises out of the jury's award of damages for lost profits resulting from plaintiff's discharge. The jury returned a verdict of $5,323.31. This included the undisputed item of $1,636.04. The balance of the verdict evidently represented $3,687.32 damages for lost profits. Plaintiff proceeded to prove his damages for prospective profits upon the theory that he was entitled to recover the contract price of 33¢ per cubic yard, less the cost of removing and hauling the dirt. He employed as criteria for the cost basis the various items of expense entailed in hauling and removing dirt from the tunnels prior to his discharge. These items consisted of wages, replacement of parts on his trucks, purchase of gasoline and oil, premiums for workmen's compensation, public liability and property damage insurance, and repair work on his trucks. By reason of the fact that he had completed substantially one-third of his contract, he had accurate records to show what it had cost him to handle this work prior to September 16, 1934. The items of proof consisted of payrolls kept by him, which were drawn up in the form required by the Sanitary District engineer showing the names of the workmen, the hours employed, the rate of pay and the amount due for each day's work. These records were made in quadruplicate, one copy going to the Sanitary District, another to the Healy Company, a third to the U. S. government. Copies of his payrolls were received in evidence as exhibits, and ran consecutively from June 22, 1934, to the date of his discharge. Another item of expense is represented by exhibits showing expenditures for parts bought for his trucks, gasoline and oil. He also made competent proof of repairs to his trucks, and premiums paid for workmen's compensation, public liability

cable yard, a total of $4,327.24. In the year just ended, $2,892, leaving a balance due of $1,435.24. There is no dispute as to this item.

The counterclaim arises out of the jury's award of damages for loss profits resulting from plaintiff's misdelivery. The jury returned a verdict of $2,000.00. This included the undisputed item of $1,435.24. The balance of the verdict evidently represented plaintiff's damages for lost profits. Plaintiff presented to prove his damages for shipwrecked profits upon the theory that he was entitled to recover the contract price of .97 per cubic yard, less the cost of removing and hauling the dirt. He implied in evidence for the cost thereof the various items of expense entailed in hauling and removing this rock and moving plant to the quarry. These items included of wages, replacement of parts on his plants, purchase of gasoline and oil, premiums for workmen's compensation, public liability and property damage insurance, and rights paid on his trucks. By reason of the fact that he had complied substantially one-third of his contract, he had actually reason to show what it had cost him to handle this work prior to September 14, 1934. The issue of proof consisted of cross-light by him, which were drawn up in the form required by the Kentucky District examiner showing the hours of the workmen, the hours employed, the rate of pay and the amount due for each day's work. These records were kept in quadruplicate, one copy going to the military district, another to the Dally Company, a third to the U. S. Government. Copies of his payrolls were received in evidence as exhibits, and he was cross-examined from them. In the course of his testimony, another item of expense in dispute by stipulation between the parties, namely the bid bonds, premiums and premiums paid for workmen's compensation, public liability guarantee and insurance paid for workmen's compensation, public liability and property damage insurance, and rights paid on his trucks.

and property damage insurance. It is plaintiff's contention that these items constitute all the items of expense properly chargeable against the cost of hauling and removing dirt under his contract, except the item of depreciation on his trucks. It appears from computations made on these items that the total cost of removing 11, 123.8 cubic yards of dirt prior to discharge was $2,287.59. Deducting this item from $4,227.04, the total contract price at 38¢ per cubic yard, leaves a net profit of $1,939.15, or 17.43¢ per cubic yard. The contract called for the removal of 34,000 cubic yards. From this plaintiff deducted the 11,123.8 cubic yards of dirt actually hauled, leaving approximately 22,986 cubic yards of dirt, which, at 17.43¢ net profit per cubic yard, amounts to $3,987.32. From this the jury evidently deducted $300 depreciation on trucks, leaving a balance of net profits lost amounting to $3,687.32, the amount included in the verdict as plaintiff's damages. After plaintiff had made his proof of the various items of cost, his counsel asked him the following questions:

> "Q. Have you figured out the total of all those expenses that you have testified to this morning, the payroll, the repairs and replacements, mechanic, gas and oil, and insurance, and deducted the cost from the contract price of thirty-eight cents a yard for the purpose of determining your profits per yard?
> "A. Yes.
> "Q. How much does that figure out?
> "A. Seventeen cents and forty-three hundredths."

No objection was made to the questions, nor was any motion made to strike the answers.

Defendant now contends, however, that it was incumbent upon plaintiff to assume the burden of proving every element of damages, and that "his failure to do so is fatal to any recovery for damages (other than nominal) for breach of contract." It is argued that in estimating a trucking job various other items enter into the computation, and in support of this contention defendant called Thomas B. Gist, employed by the Moulding-Brownell Corporation, who

and property damage insurance. It is plaintiff's contention that these items constitute all the items of claimed personal property damages which the acts of health and trucking did under his contract, except the item of diversion on his trucks. It appears from computations made on these items that the total amount of damages is $23,[illegible] which added to the $[illegible] was $[illegible]. The defendant pale it in from $[illegible], the total consumed which is $[illegible] per mile yearly, leaves a net profit of $[illegible], or $[illegible] per mile yearly. The contract called for the removal of $[illegible] yearly. From this plaintiff deducted the $[illegible] which leaves an net profit, leaving approximately $[illegible] which leaves a net, which, if $[illegible] per mile yearly, amounts to $[illegible]. Then with the jury verdict amounts plus diversion on trucks, leaving a balance of net profits last mentioned is $[illegible], the amount involved. It was error on plaintiff's damages. Since plaintiff had made his proof of the various items of cost, the counsel asked him the following questions:

"Q. Have you figured out the total of all these expenses that you have testified to this morning, the payroll, the repairs and replacements, insurance, gas and oil, and depreciation?

Objected the said from the contract price of $[illegible] leaves a bond for the purpose of maintaining your profits per year?

"A. Yes.

"Q. How much does that figure out?

"A. Seventeen cents and forty-three hundredths."

No objection was made to the questions, but we only notice this to state the answers.

Defendant now contends, however, that it was incumbent upon plaintiff to assume the burden of proving every element of damage, and that "his failure to do so is fatal to any recovery for damages (other than nominal) for breach of contract." It is argued that in assuming a trucking job various other items enter into the computation, and in absence of this computation defendant cited Thomas B. Slat, supplied by the Mountain-Pacific Refrigerating, etc

testified that it is necessary to take into consideration, in addition to the items shown by plaintiff, the following expenses: Garage rent, overhead, telephone, city and state vehicle taxes, personal property taxes, and real estate taxes for buildings maintained by the trucking concern. While some of these additional items would undoubtedly enter into a determination of the net income of a business for some purposes, such as income taxes, we think they should not properly be included in determining the net profit on a particular job. Such items as automobile license fees, taxes on equipment and buildings are ordinarily used in computing overhead expenses which must be met annually regardless of any particular contract. They are fixed charges included in computing the net income from a business, but have no application to the cost of a particular job.

In cases of this kind the measure of damages generally approved by the authorities is the difference between the contract price and what it would have cost plaintiff to complete the work according to the terms of the contract. (Hayes v. Wagner, 220 Ill. 256; McGuire v. Linston, 157 Ill. App. 222.) In computing his costs plaintiff included what appears to us to be all the essential items of expense, and while he was not categorically asked whether the items specified constituted all his expenses, we believe his testimony and the record fully sustain that conclusion. Moreover, it appears from the evidence that plaintiff had no rent to pay on his garage, because he owned it, that he had no telephone, had no employees servicing his trucks because he took care of that himself, and the other items, such as taxes, license fees and personal property taxes, as heretofore stated, are not in our opinion incidental to the contract.

In Barnett v. Caldwell Furniture Co., 277 Ill. 236, the

court, in discussing the question of prospective profits resulting from wrongful discharge, said: (p. 289)

> "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty. * * *
>
> "It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

It is further urged that plaintiff should have offered evidence as to the value of his own services, to be deducted from the contract price as an item of expense, upon the theory that plaintiff was relieved of the performance of his contract and thus had time to devote to other work. In support of this contention defendant cites cases from other jurisdictions, particularly Kentucky, Nebraska and Idaho. Whatever the rule may be in these jurisdictions, the courts of this state have generally held that plaintiff is entitled to recover the total benefit of the contract less expenses (Sedgwick on Damages, sec. 201, 9th ed.), and that the burden of proving that plaintiff could or should have mitigated his damages by other employment rests upon defendant, who breached the contract. (Ryan v. Miller, 153 Ill. 138; Neutler v. Pure Silk Hosiery Mills, 242 Ill. App. 151; Jones v. Stoneware Pipe Co., 277 Ill. App. 18.) In holding that the burden of proof is on defendant to mitigate the damages, if he can do so by showing that plaintiff did obtain, or could obtain, other work, Illinois courts follow the rule recognized in the ordinary case of breach of contract for personal services. The rule is thus stated in 6 L. R. A. (N.S.) p. 108, note 12:

> "While it is the duty of an employee who has been wrongfully discharged to make reasonable effort to avoid swelling the damages by endeavoring to obtain other employment, the plaintiff in an action for damages for an alleged wrongful discharge is not bound to show

court, in discussing the question of proximately direct damages from wrongful distress, said: (p. 109)

> "A recovery may be had for proximately direct damages arising out of such distress, but not for remote or speculative damages, which may be anticipated with reasonable certainty. . . .
>
> "It is perhaps true that absolute certainty as to the exact of loss or damage in such cases is unattainable. But that is not required to justify a recovery. All the law requires is that it be established by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. It just goes to the, quantum of the damage involved could be established with certainty. In the law regulates in cases of this character is that the evidence must give a fair degree of probability that is reasonably a basis for the assessment of damages."

It is further urged that plaintiff should have stated damages on to the value of his own services, to be deducted from the contract price in an item of expense, upon the theory that plaintiff was relieved of the performance of his services and thus had time to devote to other work. In support of this contention defendant cites cases from other jurisdictions, particularly Kansas, Nebraska and Idaho. However his citation may be in these jurisdictions, the courts of this state have generally held that plaintiff is entitled to recover the total benefit of the contract less expenses (Ingebrigtsen on Damages, sec. 222, 4th ed.), and that the burden of proving such plaintiff would or should have mitigated the damages by other gainful employment rests upon defendant, who brought the contract. Tyler v. Kilkenny 140 Ill. App. Dunlap v. Iowa City Equity Mills, 241 Ill. App. 1911; Jones v. Lawrence Tyler Co., 217 Ill. App. 12.) In saying that the burden of proof is on defendant to mitigate the damages, it is not so by showing that plaintiff did obtain or could obtain other work. Illinois courts follow the rule prescribed in the ordinary case of breach of contract for personal services. The rule is that stated in 2 L. R. A. (N.S.) p. 309, note 124:

> "While it is the duty of an employee who has been wrongfully discharged to make reasonable efforts to avoid consequent damages by endeavoring to obtain other employment, the probability of his being for damages for an illegal wrongful discharge is not found in case

affirmatively, as part of his case, that other employment was sought for and could not be found. * * *

"And the employee may rest his case upon proof of a contract for service, its breach, and damages which are determined by the contract price for services. * * *

"If the employer desires to mitigate the damages by showing that the employee had employment, or could have obtained employment by reasonable diligence, during the whole or any portion of the contract period, the burden rests with him to establish such fact."

Notwithstanding this rule, defendant argues that plaintiff should have included the value of his services in determining the cost of hauling prior to his discharge. Plaintiff's contract called for the hauling and removal of dirt. It was a flat contract price for 34,000 cubic yards of dirt, and did not require plaintiff's personal services. Plaintiff was in the contracting business, and for aught that appears in the record he may have had other jobs of a similar nature. Since the contract did not call for his personal services, we fail to see why that item should be included in the cost of hauling. It did include the wages of his chauffeurs and employees who did the work, and that, in our opinion, was sufficient.

The only other major contention made for reversal is that defendant had the right to terminate the contract at the request of D. A. Healy & Company, the general contractors, conditioned only upon defendant having acted in good faith. In his complaint plaintiff averred that, without fault on his part, defendant wrongfully prevented him from continuing the performance of his contract. Defendant answered that it did not act wrongfully, but was justified in so doing because plaintiff's work was unsatisfactory. This formed an issue of fact to be determined by the jury.

Defendant devotes a considerable portion of its brief in arguing that the verdict was against the manifest weight of the evidence. To be sure there was a conflict with reference to the manner in which plaintiff performed his work. Defendant had four

witnesses whose testimony was offered in support of the contention that plaintiff's work was in some respects unworkmanlike. On the other hand, plaintiff produced six witnesses whose testimony was directly contrary. One of plaintiff's witnesses was John Farri, night foreman for G. A. Healy Company on the job in question. Harvey Kruse, general engineer for the Healy Co., stated that when he was not on the job Farri took his place, and it appears from the record that Farri was there a considerable part of the time and had occasion to observe the manner in which plaintiff had performed his contract. No criticism is made of the instructions, and in that situation we think it was purely a question of fact for the jury to determine whether there was any reasonable ground for preventing plaintiff from performing the balance of his contract. The court and jury observed the various witnesses who testified for both parties, and from a careful examination of the record we are satisfied that the verdict and judgment were not contrary to the manifest weight of the evidence.

Defendant complains that the trial court erred in refusing to admit in evidence a letter from G. A. Healy Company to defendant requesting plaintiff's removal. The contract provided in part as follows:

> "It is understood and agreed that Mr. Longo will furnish sufficient trucks at all times to remove the dirt in a manner satisfactory to the Healy Company, and should he at any time fail to do this the Moulding-Brownell Corporation shall immediately furnish trucks to take care of the job satisfactorily, and should there be an added cost above the price agreed upon in this contract the amount above the cost mentioned will be charged to Mr. Longo."

Within the provisions of this contract the only discretion delegated to the Healy Company was to determine whether plaintiff furnished sufficient trucks at all times to remove the dirt in a manner satisfactory to it. The letter sought to be introduced requested Moulding-Brownell Corporation to discharge plaintiff, but assigned no reason therefor. The record, however, does contain evidence showing

that plaintiff was discharged at the request of the Healy Company. That is all the letter would have tended to prove, and since that proof was already in the record the letter would have added nothing and the exclusion thereof, in our opinion, does not constitute reversible error.

We find no convincing reason for reversal of the judgment, and it is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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39273

JOHN R. MARTIN,
Appellee,

v.

R. H. McELROY, Jr.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 645

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment rendered against him and in favor of plaintiff in the Municipal court of Chicago for $650 principal, $97.50 interest thereon, and costs of suit.

Prior to 1930, defendant, R. H. McElroy, Jr., had leased the premises at 828 Foster street, Evanston, Illinois, and his brother-in-law, H. B. Van Wes, operated a public garage therein. April 1, 1930, plaintiff entered into a written lease with the defendant to take over the garage for a period ending January 31, 1934. The stipulated rentals provided in the lease were as follows: $400 per month for 1930; $415 per month for 1931; $430 per month for 1932; $450 per month for 1933, and for the balance of the term. Before executing the lease defendant required plaintiff to deposit with him $650. The lease is silent as to the sum deposited, and the purpose for which it was to be used is the subject of the controversy between the parties.

Plaintiff paid his rent in accordance with the terms of the lease until November, 1931. He fell in arrears for a portion of the rental for that month and also for December, 1931, and January, 1932. January 30, 1932, plaintiff sold the garage business to one Loeby for $1,000, paid in notes of $50 denomination. At the time of the sale the lease between plaintiff and defendant was cancelled by mutual

Defendant appeals from a judgment rendered against him and in favor of plaintiff in the municipal court of Chicago for $[illegible] principal, $[illegible] interest thereon, and costs of suit.

Prior to 1931, defendant, E. E. Bentley, Jr., had leased the premises at 2[illegible] Baker street, Chicago, Illinois, and his brother-in-law, H. E. Van Ness, operated a public garage thereon. April 1, 1930, plaintiff entered into a written lease with the defendant to take over the garage for a period ending January 31, 1934. The stipulated rentals provided in the lease were as follows: $400 per month for 1930; $412 per month for 1931; $425 per month for 1932; $450 per month for 1933, and for the balance of the term. Before executing the lease defendant required plaintiff to deposit with him $[illegible]. The lease is signed as E. E. Bentley doing business as Bentley Garage, and the purpose for which it was to be used is the subject of the controversy between the parties.

Plaintiff paid his rent in accordance with the terms of the lease until November, 1931. He fell in arrears for a portion of the rental for that month and also for December, 1931, and January, 1932. January 30, 1932, plaintiff sold the garage business to one Lundy for $1,000, paid in lieu of the abandonment. At the time of the sale the lease between plaintiff and defendant was canceled by mutual

consent, and plaintiff and defendant settled their account in the following manner: Plaintiff owed a balance of $140.90 as rent for November, 1931, $127.70 for December, 1931, and $2.87 for January, 1932, aggregating $271.47. He received as credit against these charges the following items: $150 represented by three notes for $50 each, which plaintiff had received from Looby, indorsed and transferred to defendant; $100 paid by certified check to defendant; and three items for $1.50, $11.26 and $18.15 respectively, for miscellaneous credits allowed plaintiff, the grand total aggregating $280.91. There appears to be a discrepancy of $9.44, which, however, is not the subject of controversy here. The accounts of the parties were thussettled. Plaintiff received the balance of Looby's notes, aggregating $850, and defendant retained the $650 theretofore paid by plaintiff. The settlement was consummated January 30, 1932. There is no evidence to suggest that any mention was made of the $650 at the time of the settlement, and in fact no request for repayment thereof was ever made by plaintiff until February 1, 1934, almost two years later, when plaintiff filed this suit for the recovery thereof. Defendant testified that the service of summons upon him was the first notice or intimation that plaintiff calimed this sum.

The sole dispute between the parties arises out of the intended purpose of the $650 payment, and the evidence relating thereto is sharply conflicting. Plaintiff contends that this sum was deposited as security for the rent of the garage for the last two months of the term. Since the rental for the last two months was $450 a month, it is difficult to reconcile this contention with the facts. It is urged by defendant that the sum paid represented the purchase price of the garage, and after a careful examination of all the evidence we regard defendant's position as the more tenable and supported by the evidence, for the following reasons:

account, and plaintiff and defendant settle their accounts in the following manner: Plaintiff owed a balance of $180.00 as rent for September, 1970, $127.77 for December, 1971, the $3.97 for January, 1972, aggregating $307.74. He invested as stated earlier these amounts on behalf of defendant. $180 represented by three notes for $60 each, which plaintiff had received from Lady, interest was transferred to defendant; $3.97 paid by certified check to defendant; and these items for $2.80, $12.00 and $12.32 respectively, for miscellaneous credits allowed plaintiff, the grand total aggregating $307.74. There appears to be a discrepancy of $7.44, which, however, is not the subject of controversy here. The balances of the parties were thus settled. Plaintiff received the balance of Lady's notes, aggregating $180, and defendant retained the $180 interest paid by plaintiff. The settlement was accomplished January 31, 1972. There is no evidence to suggest that any mention was made of the $180 at the time of the settlement, and it first is raised in requests for judgment that was ever made by plaintiff until February 1, 1974, almost two years later, when plaintiff filed this suit for the recovery thereof. Defendant testified that the receipt of payment upon his was the first notice or indication that plaintiff claimed this sum.

The sole dispute between the parties arises out of the intended purpose of the $180 payment, and the evidence relating thereto is clearly conflicting. Plaintiff contends that this sum was deposited as security for the rent of the garage for the last two months of the term. Since the tenant for the last two months was DRMC a month, it is difficult to reconcile this contention with the facts. It is urged by defendant that the sum paid represented the premium price of the garage, and after a careful examination of all the evidence on behalf defendant's position as the more tenable and supported by the evidence, for the following reasons:

McElroy, defendant, had leased the garage prior to 1930 and evidently became the owner of the equipment contained therein, necessary for the purpose of operating a garage, consisting of a washing machine, greasing apparatus, air compressor, tire changer, office furniture and other miscellaneous items.

When defendant entered into the lease with plaintiff, defendant wrote him the following letter dated March 29, 1930:

"This will confirm our understanding to the effect that the equipment which is now on hand at the garage which includes the washing machine, greasing apparatus, air compressor, tire changer and office furniture will become your property at the expiration of your lease with the writer providing, of course, that you have met the terms of payment of the lease. You are entitled to the use of all of the equipment referred to above as long as your lease payments are made and at the end of the lease, as stated, provided all rental payments have been made, you become the owner of the equipment mentioned.

The only item which is not included in the equipment that will revert to you, is the cash register which is a separate and distinct item and you can have the use of same temporarily and then when you get around to it four to six months from now, if you want to buy the cash register, we can make some deal on it but I just wanted to have it completely understood that the cash register has nothing to do with the lease or other equipment.

I am signing this letter and if you will signify your acceptance by signing a copy, we will be in full accord."

Although the letter makes no mention of the $650 payment, it is argued by plaintiff that paragraph 1 of the letter indicates an intention on the part of defendant to give plaintiff the equipment mentioned therein gratis at the end of the term of the lease provided plaintiff makes the lease payments to the end of the term. However, the lease was cancelled by mutual consent of the parties in January, 1932, after less than two years of the term had expired, and obviously under plaintiff's own theory of the controversy he would not then have been entitled to the equipment because the lease was terminated long before the expiration thereof according to its terms. The equipment contained in the garage was essential to the business of a public garage, and no reason is suggested why defendant should have given this property, which was undoubtedly of considerable value, to plaintiff without some consider-

ation other than the mere payment of rental for the premises. Moreover, the record indicates that plaintiff sold the garage to Looby for $1,000, including the equipment, and unless plaintiff had acquired the equipment, either through a purchase thereof for $650, as defendant contends, or under the terms of the letter by paying the rental stipulated in the lease between plaintiff and defendant for a term of four years, aggregating $19,140, he had no equipment to sell to Looby.

Furthermore, the settlement of the account between the parties when the lease was cancelled indicates that plaintiff made no claim to the $650 at the time of the settlement. Their accounts were adjusted by charging plaintiff with the balance of arrears for rental due in November and December, 1931, and January, 1932, and giving him credit for an item of $100 cash, three of Looby's notes, aggregating $150, and miscellaneous items to make up the balance. If, as plaintiff contends, the $650 belonged to him, it is difficult to understand why the transaction was not consummated by simply deducting from $650 the $271.47 which plaintiff admitted to be due and then turning over to plaintiff the balance of $378.53. There is no reasonable explanation made for this settlement. Plaintiff stated that he wanted the money in full just as he gave it to defendant, and his counsel cites cases purporting to hold that defendant had the right to retain the deposit until plaintiff's entire indebtedness was satisfied and that defendant was not required by law to deduct plaintiff's debt from the $650 deposit. This contention is not tenable or convincing, and is contrary to the logic of the situation as indicated by the evidence herein.

Even assuming that defendant had the right to retain the $650 until plaintiff's entire indebtedness to defendant was satisfied, it is difficult to understand why he did not make a demand for the return thereof immediately after the accounts were settled. According to the evidence he never made a demand, and waited almost two years before instituting suit.

aside right then the arrangement of rights for the grievance procedure, however, the record indicates such plaintiff made the payment in lieu of the $1,000, including the overpayment, but denies plaintiff had received the equipment, either through a previous buyer or dealer, or directly and constantly, or using the terms of the letter by paying the rental stipulated in the lease between plaintiff and defendants for a term of four years, representing $1,000, in lieu of equipment to pull or lease.

Furthermore, the settlement of the account between the parties when the lease was cancelled indicates that plaintiff made no claim to the $1000 at the time of the settlement. This evidence was adjusted by charging plaintiff with the balance of account for rental due in September and December, 1971, and January, 1972, and giving the credit for an item of July work, three at July's meals, equipment rent, and miscellaneous items on some of the vouchers. If, as plaintiff contends, the $1000 belonged to him, it is inconceivable why the transaction was not accounted for clearly following from the $1971.47 which plaintiff admitted to be the net due rental over to plaintiff the balance of $1973.53. There is no reasonable explanation made for this settlement. Plaintiff cannot have to which the money is that also as he gave it to defendant, and the minutes clear pertaining to that that defendant had the right to retain the money until plaintiff's moving transportation was satisfied and that defendant was not required to pay to deliver plaintiff's work from the lease property. This evidence is not inconsistent, nor is contrary to the image of the statement as introduced by the written lease.

Even assuming that defendant had the right to retain the $1000 until plaintiff's moving indebtedness to defendant was satisfied, it is difficult to understand why he did not make a demand for the return thereof immediately after the moving was settled. Inasmuch as the evidence he never made a demand, and rather claims the money before instituting suit.

The only logical conclusion that can be reached from the evidence and the circumstances of this case is that defendant negotiated the sale of the garage business to plaintiff for a specified consideration of $650, and one of the considerations of the sale was that the purchase price was contingent upon plaintiff's agreement to pay his rent promptly throughout the term of the lease; that if he did so the machinery, tools and equipment on the premises should become his at the end of the term. That was evidently plaintiff's own conception of the situation when his lease with defendant was cancelled, because he then sold the garage to Looby for $1,000 and transferred to him all his right, title and interest in and to the machinery, tools and equipment.

All the evidence relative to the payment of the $650 rests on the oral statements of the parties. As against plaintiff's statement that this sum was intended as a deposit to secure the payment of rent for the last two months of the term, there is defendant's denial thereof, supported by Van Ess's evidence that the money was paid for the purchase of the garage. We think the clear weight of the evidence supports defendant's contention, and that the trial court erred in entering the judgment in plaintiff's favor.

For the reasons stated, the judgment of the municipal court of Chicago will be reversed and judgment entered here for costs in favor of defendant and against plaintiff.

REVERSED AND JUDGMENT HERE FOR COSTS IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF.

Scanlan, P. J., and Sullivan, J., concur.

The main logical consideration that has to be resolved from the evidence and the circumstances of this case is that defendant separated the sale of the plastic furniture in plaintiff's specific conditions of 1127, and one of the conditions of the sale was that the personal gifts are contingent upon plaintiff's agreement to pay his real property taxes, the term of the lease; that if he did so but continuously, only on settlement of the problem should become due at the end of the term. This was actually plaintiff's own conception of the situation when his lawyer wrote defendant, because in that call the plaintiff is "only the 11,000 and investment in him all his right, title or interest in and to the machinery, tools and equipment.

All the evidence relative to the payment of the 11,000 was the oral statements of the parties. In regular plaintiff's claim must then this was intended to a reserve to insure the payment of rent for the last two months of the term. Under the defendant's limited theory, supported by the court's evidence that the money was part of the purchase of the stores. In view of the clear weight of the evidence supporting defendant's contention, and that the trial court erred in entering the judgment in plaintiff's favor.

For the reasons stated, the judgment of the municipal court of Chicago will be reversed and judgment entered here for the sum of $[illegible] and against plaintiff.

[illegible]

[illegible]

38347

IN THE MATTER OF THE ESTATE OF
ANNA STAHL, OTTO STAHL, FRITZ STAHL
and WALTER STAHL, minors.

CASIMIR E. MIDOWICZ as receiver of
Home Bank and Trust Co.,
Appellant,

v.

ANNA STAHL, OTTO STAHL, FRITZ STAHL
and WALTER STAHL, a minor, by
ANNA STAHL, their mother and next
friend,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

283 I.A. 645

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

October 24, 1922, the Home Bank & Trust Co. was appointed by the Probate court of Cook county as guardian of the estate of Anna Stahl, Otto Stahl, Fritz Stahl and Walter Stahl, minors. June 14, 1932, ten years later, the auditor of public accounts assumed control of the bank, appointed Casimir E. Midowicz as its receiver, and filed liquidation proceedings in the circuit court.

May 29, 1933, the Stahls, two of whom had then attained their majority, filed a petition in the probate court alleging that in October, 1922, the Home Bank & Trust Co. had been appointed guardian of their estate; that it had duly qualified and since said date had been acting as such guardian; that on July 22, 1932, pursuant to an order entered in the circuit court in a cause entitled "People ex rel. Oscar Nelson, auditor of public accounts v. Home Bank & Trust Co.," being case No. B-245006, Casimir E. Midowicz was appointed receiver of the Home Bank & Trust Company, and that because of its insolvency the bank is no longer qualified or capable

October 26, 1932, the Home Bank & Trust Co. was dissolved by the Probate Court of Cook County on petition of the notaries of Home Bank, Otto Frank, Peter Frank and Walter Frank, minors. June 14, 1932, the Peoples Bank, the National of people assumed control of the bank, appointed Graham S. Blanton as the Receiver, and filed Illinois proceedings in the circuit court.

May 22, 1934, the Examiner, two of whom had been appointed Bank Receiver, filed a petition in the Probate Court alleging that in October, 1932, the Home Bank & Trust Co. had been operated greatly at their expense; that it had only qualified and whose wife date had been acting as such guardians; that on July 21, 1931, purchased in an order entered in the circuit court in a cause entitled "People ex rel. Oscar Nelson, auditor of public accounts v. Home Bank & Trust Co.," being case No. E-[illegible], Section 1. Michaelis was appointed receiver of the Home Bank & Trust Company, and that because of its insolvency the bank is no longer qualified or capable

of performing its duties as guardian; that when Anna and Otto Stahl reached their majority October 18, 1927, and November 18, 1931, respectively, the Home Bank & Trust Co., as guardian, did not account to them or pay and deliver to them their proportionate share of the estate in its possession as guardian or with which it was chargeable as such; that the guardian did not settle its accounts in the probate court at the expiration of one year, nor did it at any time file an account of the administration of its estate; that petitioners had on September 15, 1932, caused a notice to be mailed by the probate court to Midowicz, as receiver of the guardian bank, to file a current and final account on behalf of the guardian, but that he had failed so to do; and the petition prays for an order directing Midowicz as receiver to file an account of the guardianship of the Home Bank & Trust Co. from the date of its appointment in October, 1922, within a short time to be fixed by the court, that the bank, after having made a proper accounting to the probate court, be removed as guardian and that a successor guardian be appointed in its place. Thereafter, June 12, 1933, the Home Bank & Trust Co., by A. J. Gleinicke, vice president, filed its report and account as guardian, showing a detailed statement of receipts aggregating $50,129.36, and disbursements amounting to $50,112.44, leaving a balance on hand of $16.92, praying that its report be approved and confirmed, that its resignation as guardian be accepted and a successor appointed to whom it be authorized to deliver the funds and securities held in its guardianship account, upon payment of such reasonable compensation as the court may fix by its order to the Home Bank & Trust Co., as such guardian.

November 15, 1933, Casimir N. Midowicz, as receiver of the Home Bank & Trust Co., in compliance with an order of the probate court, filed his statement in said court showing the assumption of the bank's affairs by the auditor of public accounts

of performing its duties as guardian. Then when some one who
might become their majority October 18, 1937, was terminated in
1933, respectively, the Home Bank & Trust Co., on question, did
not account to them or put one active in them their property
where of the estate in its possession as guardian or else which it
was chargeable to could that the guardian did not notify the accounts
in the probate court at the expiration of one year, but did it at
any time file an account of the administration of the estate; that
petitioner had on September 18, 1934, caused a notice to be mailed
by the probate court in Arizona, as receiver of the guardian bank,
to file a sworn and final account in behalf of the guardian, but
that he had failed so to do; and the petition prays for an order
directing Arizona as receiver to file an account of the guardianship
of the Home Bank & Trust Co. from the date of the appointment in
October, 1933, within a short time to be fixed by the court, that
the bond, after hearing made a proper accounting to the probate court,
be released as guardian and that a successor guardian be appointed
in its place. Thereafter, then in, 1934, the Home Bank & Trust Co.,
by A. J. Hinkins, vice president, filed its report and accounts as
guardian, showing a financial statement of receipts aggregating
$[illegible], and disbursements amounting to $[illegible]. Instead a
bond on hand of $[illegible], praying that its report be approved and
confirmed, that its resignation as guardian be accepted and a
successor appointed in view it be authorized to deliver the funds
and securities held in its guardianship account, upon payment of
such reasonable compensation as the court may fix by its order to
the Home Bank & Trust Co., as said guardian.

November 12, 1935, Dwight D. Eisenhower, as receiver of
the Home Bank & Trust Co., in compliance with an order of the
probate court, filed his statement in said court showing the
accumulation of the bank's efforts by the auditor of public accounts

and of his appointment as its receiver; that he had examined the report of the guardian filed in the probate court June 12, 1933, and found that the figures therein corresponded with the records of the bank; that he had no personal knowledge concerning the estate or the transactions of the bank as guardian, except what was shown by the records and report, and that so far as he had been able to ascertain, the report correctly represented the transactions of the bank as guardian. In his statement Midewicz incorporated his resignation on behalf of the bank as guardian of the said minors' estate.

Thereafter, January 5, 1934, an order was entered by the probate court directing Midewicz, as receiver of the Home Bank & Trust Co., within five days thereafter to file in the office of the clerk of the probate court in the matter of the said minors' estate his verified statement in writing adopting the report filed June 12, 1933, by the Home Bank & Trust Co. as the report of the bank by him as such receiver, filed on behalf of said bank as guardian of the estate, and further ordering Midewicz to deposit with the clerk of the probate court within five days thereafter all securities, funds and property of the estate of guardianship which came into his possession or custody.

January 9, 1934, Midewicz, in compliance with the order of January 5, 1934, filed a statement adopting the report theretofore filed by the Home Bank & Trust Co., on June 12, 1933, as the report of the bank by him as its receiver, and stating that at the time of the filing of his report he had deposited with the clerk of the court all securities, funds and property of the estate of guardianship which had come into his possession and custody.

Thereafter, February 6, 1934, the two Stahls who had reached their majority and the others, acting through their mother and next friend, filed detailed objections to the report and

and of his appointment as its receiver; that in his capacity as
trustee of the preceding filing in the probate court June 23, 1933,
and there that the figures varied substantially with the records
of the bank; that he had no personal knowledge concerning the
assets or the transactions of the bank as pleaded, except that
was shown by the property and report, and that so far as he had
been able to ascertain, the report correctly represented the
transactions of the bank as pleaded. In his statement bidding
Lamberson his resignation on behalf of the bank as pleaded
of the said answer; wherefore.

Therefore, January 9, 1935, on motion and argument by the
probate court directing Bidwell, as receiver of the Home Bank &
Trust Co., within five days thereafter to file in the office of
the clerk of the probate court in the matter of the said answer,
notable his written statement in writing showing the report filed
June 23, 1933, by the Home Bank & Trust Co. on the report of the
bank by him as such receiver, filed on behalf of said bank on plead-
ing of the solicitor, and further directing Bidwell to deposit with the
clerk of the probate court within five days thereafter all accounting
Bank and property of the estate of guardianship which came into
his possession or control.

January 9, 1935, Bidwell, in compliance with the order of
January 9, 1935, filed a statement showing the report therein
filed by the Home Bank & Trust Co., on June 23, 1933, on the report
of the bank by him as its receiver, and stating that at the time
of the filing of his report he had discussed with the clerk of his
court his conclusion, there was property of the estate of guardian-
ship which had come into his possession and control.

Therefore, February 4, 1935, the bankruptcy court
treated their motion as the pleadings, noting thereon their motion
and made findings, filed certain objections to the report and

account of receipts and disbursements, acts and doings of the Home Bank & Trust Co., in its capacity as guardian and Midewica as receiver of the bank who had adopted the report as his report and account. Upon hearing of the objections the court sustained all of them except No. 5, which charged in substance that $500 had been received by the guardian on August 14, 1925, and was not properly invested so as to yield an income to the minors' estate.

An appeal from the order of the probate court was thereupon prosecuted to the circuit court, and when the matter was there heard the parties stipulated to the following facts:

"8. That the said Circuit Court of Cook County, Illinois, in said cause No. B-245[illegible]6 in said Court is administering the assets and property of the said Home Bank and Trust Company in said receivership, and therein upon the entry of said order appointing said Receiver took the assets of the said Bank into control of said Court for such administration.

"12. That orders had been entered by the Probate Court of Cook County, Illinois, in the matter of the said guardianship authorizing and directing the disbursement by said Guardian to Anna Stahl for the support and maintenance of the said minors in the amounts which are shown on the said report, making a total of Eight Thousand, Nine Hundred Forty-eight Dollars and Seventy-five Cents ($8,948.75).

"That the account of receipts and disbursements of Guardian attached to the Report of Guardian, filed on June 12, 1933, 'is in all respects a true and correct copy of the account of said Guardian as disclosed by its books and records. No objection is made to the payments of personal property taxes shown on said account, nor to the purchases of mortgages in the year 1922.'

"That all securities in which funds of the guardianship estate were invested including securities purchased without authorizing order of the Probate Court were collected or realized on in full, together with interest which is accounted for in the said report, excepting only the securities in principal amount of $15,000, to the purchase of which objection six was directed, and these securities are referred to in Paragraph 16 of Stipulation.

"16. That the securities held in the guardianship account by said Home Bank and Trust Company at the time it was closed were purchased and entered upon the account attached to the said report, as follows:

April 14, 1928, Bergthal mortgage for $4,000
April 14, 1928, Kruggel mortgage for $500
May 17, 1928, Garfield bonds ($4,000) for $3,980.30
June 15, 1930, Schneider mortgage ($1,000) for $1,002
June 15, 1930, Brown mortgage ($5,500) for $5,597.31

and interest on said mortgages and bonds was collected as appears

payment of receipts and disbursements, and return of the
Dunn Bank & Trust Co., in the capacity as executrix and administrator
as receiver of the bank who had obtained the judgment on his request
and interest. Upon hearing of the objections the court sustained
all of them except Nr. 8, which charges in substance that funds
had been received by the executrix on August 16, 1928, and are not
properly invested so as to yield an income in the minors' estates.

An appeal from the order of the probate court was interposed
prosecuted by the minors' guardian, and when the matter was there heard
the parties stipulated in the following fashion:

"8. That the said minors' share of Dunn Township, Illinois,
in said estate Nr. E-4227 in said court is substantially the same
and property of the said Dunn Bank and Trust Company in said re-
ceivership, and therein with the money or said bank appointed
said bankrupt was the assets of the said Dunn bank paid to said
Court for said administration.

"12. That funds had been received by the Pulaski County
of Dunn County, Illinois, in the matter of the said guardianship
administrator and therefor the stipulation by said Court
Dunn Bank for the account and misconduct of the said minors in
the amounts which are shown on the said report, matter of said
Dunn Township, Pulaski County, Illinois and Independent
Court for said administration.

"That the amount of receipts and disbursements of executrix
relation to the income of receivers, Dunn Bank and Trust Co., Inc.
all respective a true and correct copy of the statement of said Receivers
as filed by its books and records. Its objection is made to the
payments of personal property taxes since the work accounts, and to
the purchases of mortgages in the year 1928.

"That all credits in which funds of the guardianship
estate were invested including securities purchased without
order of the Probate Court were collected or realized on in
full, together with interest which is accounted for in the said
report, excepting only the securities in personal names of
Dunn, to the payment of which objection is not interested, and
these securities are referred to in paragraph 14 of stipulation.

"13. That the securities held in the guardianship account
by said Dunn Bank and Trust Company at the time it was closed were
purchased and returned upon the national authority in the said report,
as follows:

April 14, 1926, Bankers mortgage for $4,000
April 14, 1926, Dunn mortgage for $800
May 17, 1926, Bankers bonds ($4,000) for $3,000
June 11, 1926, Commodore mortgage ($1,000) for $1,000
June 12, 1926, Dunn mortgage ($7,000) for $7,000

and interest on said mortgages and bonds was collected as follows

in the account attached to the said report.

"18. That the parties to this appeal do not find upon the records of the Probate Court of Cook County, Illinois, in the said guardianship proceeding the entry of orders authorizing the purchase of the securities held in the guardianship account by said Home Bank and Trust Company at the time it was closed, and being the securities listed in the said report by it filed, and referred to in paragraph 16 hereinabove.

"The Probate Court entered an order directing that the securities, the purchase of which was objected to and which were held by the Bank as Guardian, be deposited by the Receiver of said Bank (Appellant herein) with the Clerk of the Probate Court 'to be held subject to the orders of this court.'

"24. That on the 8th day of January, 1934, the said Receiver deposited with the Clerk of said Probate Court, funds and property of said estate in guardianship which had come into his possession or custody, the same consisting of the securities listed on the report of said Guardian, together with cash in the sum of Sixteen Dollars and Twenty-five Cents ($16.25)."

At the conclusion of the hearing the circuit court entered a decree sustaining the objections to the guardian's report and account, and directed Kidowicz as receiver for the guardian "to account in cash" for the illegal investments of the bank as guardian and its improper management of the estate of the minors, and "to that end pay over and deliver to Anna Stahl, Otto Stahl, Fritz Stahl and Ellis and Hackett, cash in the sum of $13,231.36, and to pay to the guardian for Walter Stahl, a minor, to be appointed in the probate court of Cook county as successor to the Home Bank & Trust Co., the sum of $4,417.12; that upon said payments having been made by the receiver he shall be deemed to have fully accounted for all moneys, securities and property "with which said bank and/or said receiver is chargeable as guardian;" that neither the Home Bank & Trust Co., in its capacity as guardian, its attorneys, nor Casimir K. Kidowicz, in his capacity as receiver, nor his attorneys, are entitled to compensation on behalf of said guardian. This appeal is prosecuted by the receiver from the decree of the circuit court thus entered.

The principal question involved is whether the probate court of Cook county had jurisdiction to order the receiver of the defunct bank to make payments to the beneficiaries of the minors' estate,

from the assets of the bank, which were then being administered in a bank liquidation proceeding in the circuit court. The payments required to be made by the receiver of the defunct bank were found by the probate court to be due "on account of illegal investments and mismanagement" of the guardianship estate. This clearly constituted a claim against the assets of the bank then in liquidation in the circuit court. Under the rules announced in Chicago Title & Trust Co. v. Goldman, 272 Ill. App. 457, which was a case involving similar jurisdictional questions, such claims must be presented in the court where the liquidation proceeding was then pending. In the Goldman case, Chicago Title & Trust Co., as trustee, filed its bill in the circuit court to foreclose a trust deed, and Phillip State Bank & Trust Co. was appointed receiver. Subsequently the bank failed, and Charles H. Albers was appointed receiver by the auditor of public accounts. Shortly thereafter, in proceedings brought by the auditor against the bank in the superior court, Mr. Albers was appointed receiver of the bank. Still later, Raymond Hayes was appointed "successor receiver" in the foreclosure proceedings pending in the circuit court. Albers, as receiver of the bank, was ordered by the circuit court to pay the "successor receiver" in the foreclosure proceedings $2,966.72, and from this order the receiver of the bank prosecuted an appeal. The facts and circumstances in that case, so far as they involve the jurisdictional question, were similar to those involved in this proceeding. In an exhaustive opinion by Mr. Justice Scanlan reviewing numerous decisions in this state and other jurisdictions, it was held that another court of co-ordinate jurisdiction has no right to interfere with property in the hands of a receiver already appointed nor to attempt to control or call him to account. It was there said: (p. 463)

"It is for the court which has taken the assets of an insolvent corporation into its hands for distribution, and for

that court alone, to determine who its creditors are and the amounts of their respective claims. * * *

"All the authorities sustain the proposition that, when a court of equity acquires jurisdiction of a cause, and appoints a receiver to take charge of the property involved, then no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver, but must leave the court appointing the receiver untrammeled in its administration of the case, as the law directs, regardless of whether the original appointment was or was not erroneous. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons, and has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. (23 R. C. L. 66.)"

The opinion further stated in apt terms: (p. 468)

"The chancellor of the superior court has the sole right to administer the estate, to determine who are the creditors of the Bank and the amounts of their respective claims, and to hold the assets, through his receiver, for the benefit of those whom he ultimately adjudges to be entitled thereto, and in the performance of his plain duty in the premises he will not permit his receiver to obey the instant order of the circuit court. * * *

"The proper procedure in the instant case is for the chancellor of the circuit court to order the 'successor receiver' to file a claim in the Bank receivership proceedings in the superior court. In that proceeding, in an orderly, equitable way, all of the creditors of the Bank will have their day in court."

Counsel for petitioners take the position that the probate court, which was created by the general assembly under art. 6, sec. 20 of the constitution of 1870, has exclusive jurisdiction to settle the accounts of its guardian. We think, however, they confuse the term "exclusive" jurisdiction with that of original jurisdiction. It was held in Klokke v. Judge, 103 Ill. 123, that probate courts may be established in the class of counties indicated by their population whenever the legislature may see proper to do so, and that such courts will have original jurisdiction in certain matters, but "there is no authority in the constitution for making that jurisdiction exclusive. Both courts (county and probate) have, and may continue to have, original jurisdiction in a class of cases designated. Nothing contained in the constitution is inconsistent with two courts of the same county having original jurisdiction in the same class of cases."

that court-alone, in direction (in its opinion) are not the matters of their respective claims. * * *

"All the authorities mentioned are inapplicable thus, when a court of equity assumes jurisdiction of a cause, and obtains a verdict, in his court of the property involved, then on the ground of an-original jurisdiction has any power to interfere or enjoin or monkey with the property in the hands of the plaintiff, but must leave the court exercising the primary jurisdiction of the case, in relationship of the case, or the rights, regardless of another the original complainant, who or not was concerned. This rule is founded in the mutual comity between courts of justice, and is plainly essential, conflicts between courts (the jurisdiction between the same subjects and persons, and the interference in the supremacy of the tribunal who has acquired the expression in truth of the controlling claims, in behalf of which the conflicting jurisdictions are invoked. (Ed. 6, p. 2, 20-).

The opinion further stated in our report (p. 108)

"The chancellor if the validity would that the sole right to adjudicate the estate, to determine the rights of the Bank and its amount of their respective claims, and to hold the assets, strength his evidence, for the benefit of those who be directly entitled to be entitled thereto, and in the performance of his duties in the exercise of the jurisdiction of the court. * * *

"The proper procedure in the instant case is for the receiver of the client court to make the 'necessary' to file a claim in the Bank receivership proceedings in the separate court. In that proceeding, in an activity, available only, all of the creditors of the Bank will have their day in court."

Counsel for petitioners note the position that the statute, which was created by the general assembly under art. 4, sec. 20 of the constitution of 1870, has exclusive jurisdiction in avoid the contents of the question. To wit, however, they overlook the term "exclusive" jurisdiction with that of original jurisdiction. It was held in Clarke v. Jackson, 3 Ill. 124, that judges courts may be authorized in the place of complete authorized by their jurisdiction however the legislature may see proper to do so, and that such courts will have original jurisdiction in a given matter, but there is no authority in the constitution for making that jurisdiction exclusive. Such courts (county and circuit) have, and may continue to have, original jurisdiction in a class of cases of equity nature. Nothing contained in the constitution is inconsistent with the course of the same courts having original jurisdiction in the same class of cases."

It has been held that the circuit courts of this state have jurisdiction to hear and determine in suits against executors and administrators claims which might have been presented in the probate court, indicating that the latter does not have exclusive jurisdiction of such matters. In Darling v. McDonald, 101 Ill. 370, it was said: (p. 373)

"The order from which this appeal is prosecuted directs the payment of a judgment rendered by the circuit court of Richland County, in favor of McDonald and against Darling's executors, in an action of assumpsit, for the personal services of McDonald in nursing Darling during his last sickness. Beyond all question this was a 'cause in law,' and being such, the court had original jurisdiction in 'the cause' under sec. 12, art. 6, of the constitution; and this jurisdiction is unaffected by the statute conferring jurisdiction upon the county court in the same class of 'causes.' Myers v. The People, 67 Ill. 503; Mapes v. The People, 69 id. 525; Burns v. Henderson, 80 id. 264.

"* * *

"The circuit court having original jurisdiction, unaffected by the statute conferring jurisdiction upon the county court, in the 'cause in law,' it necessarily follows that it had power to render a judgment therein binding upon the parties, and power to enforce a judgment follows, also, as a necessary incident to the power to render the judgment; * * *."

We regard the Goldman case as conclusive upon the jurisdictional question here involved. The circuit court, in which the liquidation proceeding was pending, had the right to administer the estate, to determine who were the creditors of the bank, and the amounts of their claims, and to hold the assets intact through its receiver for the benefit of those whom the court might ultimately adjudge to be entitled thereto. To permit two courts to enter orders on a receiver would result in chaos. The probate court had jurisdiction requiring the guardian to file a report and account, but could not compel him to pay petitioners from assets over which the circuit court had jurisdiction. As is indicated in the Goldman case, the proper procedure would have been for the probate court to have appointed a successor guardian for the petitioner who was still a minor, and to have authorized and directed him to file his claim in the bank liquidation proceeding, where the rights of the minor and the other petitioners could be determined in an orderly manner.

Whether or not petitioners would be entitled to a preferred claim would be a matter for the circuit court to determine, but in any event their rights could be as fully protected in that proceeding as in the probate court.

Counsel for petitioners argue that the receiver submitted to the jurisdiction of the probate court. The record shows that he came in unwillingly, challenging the jurisdiction of the court all through the proceeding, and under the circumstances it cannot well be argued that he voluntarily submitted thereto.

Holding as we do that the probate court lacked jurisdiction to require the receiver to account and pay from the assets of the defunct bank cash found to be due from the guardian on account of illegal investments and mismanagement, it becomes unnecessary to consider and pass upon the merits of the controversy relating to these investments or to review the correctness of the court's decree in ruling upon the objections to the guardian's report and account.

For the reasons stated herein the decree of the circuit court is reversed and the cause remanded with directions to take such further proceedings as may be necessary and proper to protect the rights of petitioners, not inconsistent, however, with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

Neither of the politicians could be satisfied in a democratic state unless he is sure that the electoral means to victories, but in any cases single rights could be so clearly established in this direction as in the western states.

Concerning the politicians argue that the territory occupied by the Jurisdictions of the Western states. The Tenure which that be case in essentially establishing the Jurisdiction of the case all concerning the territory, and which has circumscribed it cannot well be claimed that be extensively considering.

Nothing is to do that the Western Union Under Jurisdiction is begins and continues to exercise not and from the events of the History that this tends to be the time the territory is subject of Either Investigate and determination, it because concerning to equality and also the events of the concerning relating to these investments or it relate the circumstance of the Western states in relation from the objections in the Jurisdiction right and concern.

For the reasons stated herein the decree of the district court is reversed and its cause remanded with directions to take such further proceedings as may be necessary and right to protect the rights of politicians, and independent, however, with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Chapman, C.J. and Hartigan, J., concur.

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38102

ELLA FIGAS,
Defendant in Error,

v.

LEO FIGAS,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

283 I.A. 645[3]

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error seeks the reversal of a decree of divorce entered February 18, 1933, against defendant, Leo Figas, on a bill of complaint filed by his wife, Ella Figas, on April 21, 1932. No brief has been filed in this court by plaintiff.

It is alleged by plaintiff in her bill that the parties were married in Berlin, Germany, June 24, 1920, lived and cohabited together as husband and wife until on or about April 27, 1932, and at the time of the filing of the bill had three living children of the respective ages of 17, 11 and 7. She charged as her only ground for divorce that defendant had been guilty of extreme and repeated cruelty; that "on or about the 20th day of February, 1931, the said defendant, beat, struck and knocked her down with a shoe and hit her on the side with a picture frame, and broke up all of the family pictures belonging to your oratrix; and that again, on or about the 27th day of April, A. D. 1932, said defendant struck, beat and generally abused your oratrix."

May 11, 1932, defendant filed an answer admitting the marriage and the birth of the children but denying both the general and specific charges of cruelty.

The decree found that the court had jurisdiction of the parties and the subject matter and "that said defendant, Leo Figas, has been

IN THE

CIRCUIT COURT,

Defendant in Error,

v.

ZOO VIGAS,

Plaintiff in Error.

ERROR TO CRIMINAL COURT

OF COOK COUNTY.

MR. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT:

This writ of error seeks the reversal of a judgment of plaintiff entered November 14, 1951, against defendant, Joe Vigas, on a bill of complaint filed by his wife, Zoo Vigas, on April 23, 1951. The brief has been filed in this court by plaintiff.

It is alleged by plaintiff in her bill that the parties were married in Turkey, Greece, June 24, 1948, lived and cohabited together in Chicago and city until on or about April 27, 1949, and at the time of the filing of the bill had three living children of the respective ages of 14, 11 and 7. The charges as her only ground for divorce that defendant had been guilty of adultery and repeated cruelty; that "on or about the 20th day of February, 1951, the said defendant, Joe, struck and beaten her down with a shoe and hit her on the side with a picture frame, and broke up all of the family pictures belonging to them everyday; and that again, on or about the 17th day of April, A. D. 1950, said defendant struck, beat and generally abused her constantly."

May 11, 1950, defendant filed an answer admitting the marriage and the birth of the children but charging both the general and specific charges of cruelty.

The decree issued the decree and jurisdiction of the parties and the subject matter and "that said defendant, Joe Vigas, has been

guilty of extreme and repeated cruelty towards the complainant," but contained no finding of facts to sustain the conclusion that defendant was guilty of "extreme and repeated cruelty."

Defendant contends that plaintiff's bill of complaint was insufficient and should have been dismissed for want of equity because it charged only one act of cruelty as having occurred prior to the filing of her bill for divorce; and that the decree is erroneous for want of specific findings of fact or evidence in the record to sustain it.

The record presented to this court is certified as complete by the clerk of the superior court and neither a certificate of evidence nor master's report is included therein. At the time the decree was entered in this cause it was the settled law of this state that a party granted affirmative relief in chancery was required to preserve the evidence upon which the decree was based by a specific finding in the decree itself of the facts that were proven on the hearing or by a certificate of evidence or a master's report.

In passing upon this question in French v. French, 302 Ill. 152, the court said at pp. 158, 159:

"In this State the rule prevails that no presumption can be indulged in a chancery case that the evidence is sufficient to sustain the decree therein unless it appears in the record * * *. In order to support such a decree the specific facts proved on the hearing must be found in the decree or preserved by a certificate of the evidence where the evidence is oral testimony taken before the court under our statute allowing oral testimony in chancery cases. It is also now the settled rule under that statute that a recital of the ultimate facts in the decree as proved is sufficient to sustain the decree, and if that is done the evidence need not be otherwise preserved. (Rybakowicz v. Rybakowicz, 290 Ill. 550.) It is equally well settled that a mere recital in the decree, by way of a finding, that all the material allegations of the bill are proven and that the equities of the cause are with the complainant is not a finding of facts but is a mere conclusion, and is not sufficient to support a decree granting affirmative relief. (VanMeter v. Malchef, 276 Ill. 451.) This same rule applies to jurisdictional facts which are necessary to be established to give the court jurisdiction of the subject matter or of the class of suits to which the particular suit belongs, and a finding in the decree that the court has jurisdiction of the subject matter of the cause is a mere conclusion and is not a sufficient finding of the jurisdictional facts in such a case. (Becklenberg v. Becklenberg, 232 Ill. 120; Village of Harlem v. Suburban Railroad Co., 202 id. 301.)"

In Ohman v. Ohman, 233 Ill. 632, the court said at p. 633:

guilty of extreme and repeated cruelty towards the complainant,"
but contained no finding of facts to sustain the conclusion that
defendant was guilty of "extreme and repeated cruelty."

Defendant contends that plaintiff's bill of complaint was
insufficient and should have been dismissed for want of equity because
it charged only one act of cruelty as having occurred prior to the fil-
ing of her bill for divorce; and that the decree is erroneous for want
of specific findings of fact or evidence in the record to sustain it.

The record presented to this court is certified as complete
by the clerk of the superior court and neither a certificate of evidence
nor master's report is included therein. At the time the decree was
entered in this cause it was the settled law of this state that a party
seeking affirmative relief in chancery was required to preserve the evi-
dence upon which the decree was based by a specific finding in the decree
itself or the facts that were proven on the hearing or by a certificate
of evidence or a master's report.

In passing upon this question in Kenney v. Kenney, 88 Ill. 141,
the court said at pp. 138, 139:

"In this State the rule prevails that no presumption can be
indulged in a chancery case that the evidence is sufficient to sustain
the decree therein unless it appears in the record * * *. In order to
support such a decree the specific facts proved at the hearing must be
found in the decree or preserved by a certificate of the evidence. Unless
the evidence is oral testimony taken before the court under our statute
allowing oral testimony in chancery cases. It is also one the settled
rule under that statute that a recital of the ultimate facts in the
decree as proved is sufficient to sustain the decree, but if that is
done the evidence must not be otherwise preserved. (Pennsylvania v.
Hydeville, 200 Ill. 200.) It is equally well settled that a mere
recital in the decree, by way of a finding, that all the material
allegations of the bill are proven and that the equities of the cause
are with the complainant is not a finding of facts but is a mere con-
clusion, and is not sufficient to support a decree granting affirmative
relief. (Vandiver v. Kulchef, 276 Ill. 481.) Then same rule applies
to jurisdictional facts which are necessary to be established to give
the court jurisdiction of the subject matter or of the class of cases
to which the particular suit belongs, and a finding in the decree that
the court has jurisdiction of the subject matter of the cause is a mere
conclusion and is not a sufficient finding of the jurisdictional facts
in such a case. (Beard[illegible]ver v. Beard[illegible]ver, 320 Ill. 324; Bilings of
Bering v. Suburban Natural Gas, 346 Ill. 2[illegible].)"

In Gibson v. Gibson, 356 Ill. 494, the court said at p. 496:

"The evidence was not preserved in the record, and the only finding of the decree is, 'that the allegations in the said bill contained are true, as therein stated, and the equities of this cause are with the complainant.'

"In chancery it is incumbent upon the party in whose favor a decree granting relief is entered, to preserve in the record the evidence justifying the decree. Contrary to the rule of law, no presumption will be indulged that evidence sufficient to sustain the decree was heard if such evidence does not appear in the record. The general finding that all the material allegations in the bill are proved and that the equities of the case are with the complainant will not sustain a decree granting relief, where there is no finding of specific facts and the evidence is not preserved in the record. (Village of Harlem v. Suburban Railroad Co., 202 Ill. 301; Forsell v. Siffert, 207 id. 621; Berg v. Berg, 223 id. 209; Becklenberg v. Becklenberg, 232 id. 120.) Where there has been a verdict of a jury or a report of a master finding the facts, such verdict or report preserves in the record the facts established instead of the evidence heard to establish the facts, and the evidence need not be otherwise preserved. (Thatcher v. Thatcher, 17 Ill. 66.)"

In the instant case there was neither the verdict of a jury, report of a master, certificate of evidence nor finding of specific facts in the decree itself to sustain same and it was therefore erroneously entered.

Furthermore plaintiff's bill of complaint was clearly insufficient since it appears on its face that only one of the acts of cruelty charged was alleged to have occurred prior to the filing of the bill. No proper grounds for divorce under our statute having been alleged, the bill did not confer jurisdiction upon the court and should have been dismissed.

For the reasons herein stated the decree of the superior court is reversed and the cause remanded with directions to dismiss plaintiff's bill of complaint for want of equity unless within a reasonable time to be fixed by the trial court she shall elect to amend her bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

"The evidence was not presented in the record, and the only finding of the court was that the [illegible] in the trial still remained and free, on bonds in which, and the sureties of this bond are with the complainant."

"In chancery it is immaterial upon the party in whose favor a verdict directed is entered, to produce in the record the evidence justifying the finding. Contrary to the rule at law, the presumption will be indulged that evidence sufficient to sustain the verdict was heard if such evidence does not appear in the record. The general finding that the material allegations in the bill are proved and that the equities of the case are with the complainant will not exclude a decree granting relief, where there is no finding of specific facts and the evidence is not preserved in the record. (Fidelity et Deposit Co. v. Chatham Thalmann Co., 200 Ill. 201; Bergquist v. Bergquist, 207 Ill. 221; Hunt v. Hunt, 180 Ill. 309; Bergquist v. Bergquist, 208 Ill. 240.) Where there has been a verdict at law or a report of a master finding the facts, such verdict or report necessary in the record the facts constituent implied of the evidence under is evidence the facts, and the evidence need not be otherwise preserved. (Bumbaugh v. Bumbaugh, 17 Ill. 64.)"

In the instant case there was neither any verdict of a jury, report of a master, certificate of evidence nor finding of specific facts in the decree itself in question and it was therefore arbitrarily entered.

Defendants plaintiff's bill of complaint was clearly insufficient since it appears on its face that only one of the acts of cruelty charged was alleged to have occurred prior to the filing of the bill. No proper grounds for divorce under our statute could thus have been alleged, the bill did not aver jurisdiction upon the court, and should have been dismissed.

For the reasons herein stated the decree of the superior court is reversed and the cause remanded with directions to dismiss plaintiff's bill of complaint for want of equity unless within a reasonable time to be fixed by the trial court she shall elect to amend her bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Gordon, P. J., and Friend, J., concur.

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38155

IRVING W. HERSEY, Appellee, v. CHICAGO TECHNICAL COLLEGE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 645

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $2,675 rendered January 8, 1935, against defendant, Chicago Technical College, on the verdict of a jury in a first class action brought by plaintiff, Irving W. Hersey, for a balance of salary as an instructor alleged to be due under a written contract between the parties.

Plaintiff's statement of claim avers in substance that April 28, 1930, he and defendant entered into a written contract whereby he agreed to render services as an instructor in architecture in defendant's college and defendant agreed to compensate him for his services $3,760 for the year of twelve months beginning June 1, 1930, and ending May 31, 1931, $3,970 for the year beginning June 1, 1931, and ending May 31, 1932, and $4,180 for the year beginning June 1, 1932, and ending May 31, 1933, said salaries to be paid in monthly installments of $250 each, "the excess above this to be paid in such installments and at such times during each year as may be most convenient to the college, but whether paid in installments or as a whole, this excess shall be paid each year before the end of the year's term on May 31;" that the contract further provided that "$400 of the total each year is an amount paid by the college

that "$400 of the total each year in no account paid by the college and of the year's term on May 31:" that the contract for that provided may be most convenient to the college, but whether paid in instalments or as a whole, this excess shall be paid each year before the end of the year's term on May 31; that the contract for that provided that "$400 of the total each year in no account paid by the college

to you in consideration of your attending some well known educational institution during the months of June, July and August of each year and pursuing studies leading to an advanced degree in architecture;" and that, in the event plaintiff decided not to do this at any of the summer periods during the term of his employment, $400 a year was to be deducted from his salary.

It further alleges that in accordance with the terms of said contract plaintiff entered into the employ of defendant and continued in such employ until May 31, 1933, at all times fully complying with all the terms of the contract to be kept and performed by him; that he attended well known educational institutions during the months of June, July and August of each year; that since May 31, 1932, defendant refused to pay him a balance of $970 due on his salary of $3,970 for the year ending May 31, 1932; that since May 31, 1933, defendant refused to pay him a balance of $1,705 due on his salary of $4,180 for the year ending May 31, 1933; and that by reason of such defaults plaintiff has been damaged in the sum of $2,675.

Defendant's amended affidavit of merits, after admitting that it had entered into the written contract with plaintiff as alleged in his statement of claim, avers that prior to October 15, 1930, it employed twelve instructors in the same capacity as plaintiff; that, on or about that date, defendant was in a precarious financial condition and was about to cease doing business unless the expenses of the school were drastically reduced; that, in consideration of the acceptance of a proposed reduction of salaries by all its instructors, plaintiff agreed with defendant and with the other instructors to accept a reduction of 20% in the salary provided in his written contract for the year beginning June 1, 1931, and ending May 31, 1932; that this salary reduction was

1, 1921, and ending May 31, 1922; that this salary reduction was agreed to in his written contract for the year beginning June 1, 1922, and ending May 31, 1923; that he continued to work with the other instructors to secure a reduction of C&W in line with the other instructors, plaintiff agreed with defendant in consideration of the acceptance of a proposed reduction of salaries by all the instructors, plaintiff agreed with defendant that the salaries of the instructors, including the salary of plaintiff, should be reduced from the rate of $4,500 a year and to be deducted from his salary.

It further alleges that in accordance with the terms of said contract plaintiff entered into the employ of defendant and continued in such employ until May 31, 1922, at all times fully complying with all the terms of the contract to be kept and performed by him; that he delivered unto defendant the instruments and performed the duties of his employment in the month of June, July and August of each year; that since May 31, 1922, defendant refused to pay him a balance of $470 due on his salary of $5,970 for the year ending May 31, 1922; that since May 31, 1923, defendant refused to pay him a balance of $1,728 due on his salary of $4,720 for the year ending May 31, 1923; and that by reason of such defaults plaintiff has been damaged in the sum of $6,898.

Defendant's demurrer alleged, at origin, after admitting that it had entered into the written contract with plaintiff as alleged in his statement of claim, avers that prior to October 15, 1920, it employed twelve instructors in the same capacity as plaintiff; that, on or about this date, defendant was in a precarious financial condition and was about to cease doing business; that the expenses of the school were excessively reduced; that, in consideration of the acceptance of a proposed reduction of salaries by all the instructors, plaintiff agreed with defendant that the salaries of the instructors, including the salary of plaintiff, should be reduced from the rate of $4,500 a year and to be deducted from his salary.

It further alleges that in accordance with the terms of said contract plaintiff entered into the employ of defendant and continued in such employ until May 31, 1922, at all times fully complying with all the terms of the contract to be kept and performed by him; that he delivered unto defendant the instruments and performed the duties of his employment in the month of June, July and August of each year; that since May 31, 1922, defendant refused to pay him a balance of $470 due on his salary of $5,970 for the year ending May 31, 1922; that since May 31, 1923, defendant refused to pay him a balance of $1,728 due on his salary of $4,720 for the year ending May 31, 1923; and that by reason of such defaults plaintiff has been damaged in the sum of $6,898.

Defendant's demurrer alleged, at origin, after admitting that it had entered into the written contract with plaintiff as alleged in his statement of claim, avers that prior to October 15, 1920, it employed twelve instructors in the same capacity as plaintiff; that, on or about this date, defendant was in a precarious financial condition and was about to cease doing business; that the expenses of the school were excessively reduced; that, in consideration of the acceptance of a proposed reduction of salaries by all the instructors, plaintiff agreed with defendant

accepted by plaintiff and all the other instructors; that, on or about September 15, 1932, and subsequent to the acceptance by plaintiff of the 20% reduction in his salary, defendant was again in a precarious financial condition and was about to cease doing business when plaintiff, in consideration of the acceptance of a proposed reduction of salaries by all the instructors, agreed with defendant and with the other instructors to accept a reduction of 35% in the salary provided in his written contract for the year beginning June 1, 1932, and ending May 31, 1931; that said reductions were accepted by plaintiff and all the other instructors and plaintiff remained in the employ of defendant under the reduced salary for several months after the expiration of his contract with defendant; that prior to the summer of 1932, it was mutually agreed between the parties that plaintiff would forego attendance at a recognized university during the summer months and that no claim would be made for the $400 provided therefor in the contract; and that defendant having paid plaintiff the sums of money agreed upon between them was not indebted to him in the amount claimed in his statement of claim or any part thereof.

Plaintiff was the only witness who testified in support of his claim. Twelve witnesses were called by defendant to sustain its defense.

The errors relied upon by defendant for the reversal of the judgment are (1) that the verdict is contrary to the manifest weight of the evidence; (2) that contrary to the law, the jury arbitrarily disregarded the credible and uncontradicted testimony of all the witnesses for defendant and relied upon the sole, unsupported, uncorroborated and contradictory testimony of the plaintiff; (3) that it is evident from the record that the verdict of the jury in this case was entirely the result of passion, prejudice and

accepted by plaintiff and all the other investors; that, on or about September 18, 1928, and subsequent to the acceptance by plaintiff of the 500 debentures in his salary, defendant was again in a precarious financial condition and his fight to secure being business when plaintiff, in consideration of the acceptance of a proposed reduction of salaries by all the investors, agreed with defendant and with the other investors to accept a reduction of 35% in the salary provided in his written contract for the year beginning June 1, 1928, and ending May 31, 1929; that said reductions were accepted by plaintiff and all the other investors and plaintiff remained in the employ of defendant under the reduced salary for several months after the expiration of his contract with defendant; that prior to the summer of 1929, it was mutually agreed between the parties that plaintiff could forego attendance at a recognized university during the summer months and that no claim would be made for the $500 provided therefor in the contract; and that defendant having paid plaintiff the sum of money agreed upon between them was not indebted to him in the amount claimed in his statement of claim or any part thereof.

PLAINTIFF was the only witness who testified in support of his claim. Twelve witnesses were called by defendant to sustain its defense.

The errors raised upon by defendant for the reversal of the judgment are (1) that the verdict is contrary to the manifest weight of the evidence; (2) that contrary to the law, the jury arbitrarily disregarded the credible and uncontradicted testimony of all the witnesses for defendant and relied upon the sole, unsupported, uncorroborated and contradictory testimony of the plaintiff; (3) that it is evident from the record that the verdict of the jury in this case was entirely the result of prejudice, prejudice and

sympathy and should be set aside; (4) that the court erred in refusing to set aside the verdict and to grant defendant a new trial; (5) that the court erred in excluding evidence offered by defendant in support of the theory of its defense and in support of the issues as raised by the pleadings; (6) that the court erred in giving an instruction to the jury which eliminated the force and effect of the greater number of witnesses as a factor in determining the preponderance of the evidence, thereby misleading the jury to the prejudice of defendant; and (7) that the court erred in refusing to instruct the jury upon defendant's theory of defense and upon the issues of the case as raised by the pleadings.

Plaintiff's theory is that the verdict of the jury was amply supported by evidence in the record that he never agreed to the modification of his written contract and that defendant agreed to pay him for the last two years of its term the full amount of salary as specified in said written contract.

It is conceded that if defendant proved a modification of the written contract whereby plaintiff agreed to and did accept a reduction in his salary as provided in the said contract and that payment had been made in accordance with such modification, then he is not entitled to recover.

The defense as set forth in defendant's amended affidavit of merits was that in October, 1931, defendant was in a precarious financial condition and would be compelled to close its school unless something was done to remedy the situation; and that all of its instructors, including plaintiff, agreed with each other and with defendant to accept and did accept a reduction in salary in order to keep the school open and to insure the continued employment of all the instructors. No motion was made to strike the amended affidavit of merits presenting this defense and it was the defense upon which the parties went to trial. That it was a proper legal defense

sympathy and should be not guilty; (4) that the court erred in refusing to set aside the verdict and to grant defendant a new trial; (5) that the court erred in admitting evidence offered by defendant in support of the theory of his defense and in support of the issues as raised by the pleadings; (6) that the court erred in giving an instruction to the jury which eliminates the force and effect of the greater number of witnesses as a factor in determining the preponderance of the evidence, thereby misleading the jury to the prejudice of plaintiff; and (7) that the court erred in refusing to instruct the jury upon defendant's theory of defense and upon the issues of the case as raised by the pleadings.

Plaintiff's theory is that the verdict of the jury was amply supported by evidence in the record that he never agreed to the modification of his written contract and that defendant agreed to pay him for the last two years of his term the full amount of salary as specified in said written contract.

It is conceded that if defendant proved a modification of the written contract whereby plaintiff agreed to and did accept a reduction in his salary as provided in the said contract and that payment had been made in accordance with such modification, then he is not entitled to recover.

The defense as set forth in defendant's amended affirmative of merits was that in fact, plaintiff and defendant was in a precarious financial condition and would be compelled to close its school unless something was done to remedy the situation; and that all of its instructors, including plaintiff, agreed with each other and with defendant to accept a reduction in salary in order to keep the school open and to insure the continued employment of all the instructors. No action was made to strike the amended affidavit of merits presented with defendant and in fact the defense upon which the parties went to trial. That it was a proper legal defense

cannot be questioned and defendant was entitled to present to the jury any competent evidence that tended to sustain it, as well as to have the jury properly instructed on its theory.

Plaintiff's written contract with defendant containing the terms heretofore set forth in his statement of claim was received in evidence, and he testified in his own behalf that he performed all the conditions of the contract incumbent upon him to perform; that defendant owed him a balance of $970 under his contract for the year ending May 31, 1932, for which he made a demand shortly prior to said date; that defendant owed him a balance of $1,705 under his contract for the year ending May 31, 1933, the payment of which, along with the balance of $970 from the previous year, making a total of $2,675, he demanded shortly before the last mentioned date; that he attended an educational institution during June, July and August of each of the years covered by the contract; that after the expiration of his contract he was in the employ of defendant for about three or four weeks in September and possibly up to the first of October, 1933; and that on December 21, 1933, he wrote defendant a letter requesting the balance due him under his written contract.

Charles W. Money, its president, testified substantially that defendant, Chicago Technical College, conducted day and evening resident classes and home study courses; that it employed twelve instructors in its resident college and four or five other persons to correct home study lessons; that plaintiff was paid his full salary under the written contract for the year ending May 31, 1931; that there were two classes of students, those who paid in advance for a year or more and those who paid in monthly installments; that the tuition of those who paid in advance was invested in a reserve fund in real estate mortgages, bonds and other securities; that the school year commencing September, 1931, showed a marked depreciation in defendant's reserve fund, with many defaults as to principal and

cannot be questioned and defendant was entitled to present to the jury any competent evidence that tended to sustain it, as well as to have the jury properly instructed on its theory.

Plaintiff's entire contract with defendant was included in evidence, and he testified in his own behalf that he performed all the conditions of the contract incumbent upon him to perform; that defendant owed him a balance of $[illegible] under his employment during May 23, 1922, for which he made a demand shortly prior to said date; that defendant owed him a balance of $1,700 under his contract for the year ending May 23, 1923; the payment of which, along with the balance of $[illegible] for the previous year, making a total of $2,070, he demanded shortly before the last mentioned date; that he effected an amicable termination of his employment, fully and in accordance with the terms of his contract; that during the period of his employment he was in the employ of defendant for about three or four weeks in September and possibly up to the first of October, 1922; and that on December 23, 1922, he wrote defendant a letter requesting the balance due him under his written contract.

Charles W. Henry, the president, testified substantially that defendant, Chicago Technical College, conducted day and evening institutions in the technical college and four or five other persons received classes and home study lessons; that plaintiff was paid his $[illegible] salary under the written contract for the year ending May 23, 1923; that there were two classes of students, those who paid in advance for a year or more and those who paid in monthly installments; that the tuition of those who paid in advance was invested in a treasury fund in real estate mortgages, bonds and other securities; that the money received from commercial students, $[illegible], should a certain expenditure of $[illegible] for the year ending December 31, 1922, and the balance was used for general purposes; that defendant's revenue fund, with many deficits as a principal and

interest, and a striking decrease in enrollment of students and payments of tuition fees; that he called a meeting of the instructors October 15, 1931, when he advised them generally as to the precarious financial condition of defendant, suggesting that they give thought to the possibility of the school having to close and to means by which it might be kept open and all the instructors continued in employment, and that he would call them into another meeting shortly; that October 29, 1931, all the instructors, including plaintiff, were called into a meeting with the officers and all the employees of defendant; that the witness explained in detail with graphs, charts and figures on a blackboard the depreciation of defendant's reserve fund, in which advance tuition fees had been invested, the drastic decrease in the enrollment of students and the payment of tuition fees as compared with prior years, and, after stating that the salaries of office employees and all others, except instructors, had been reduced and that the rent of the college premises, advertising and operating expenses had been curtailed to the limit, advised the instructors that it would be necessary to close the school unless they agreed to a reduction of their salaries so that the expenses might be brought within the receipts; that Professor Black, one of the instructors, proposed and moved that all the instructors accept a reduction in salary in order to keep the school from closing, and that when the witness asked if there was any objection on the part of any of the instructors to the proposed reduction of their salaries, there was none; that he then told them that he would work out a schedule of the reductions and notify them individually; and that shortly thereafter he discussed with plaintiff a reduction of 20% in the salary of each instructor in consideration of all the others taking the same cut and plaintiff agreed to the reduction.

Morey further testified that defendant paid plaintiff $3,000

for the year ending May 31, 1932, and $2,475 for the year ending May 31, 1933; that Hersey made no demand for the difference between what he received and the amounts stipulated in his contract until he wrote the letter of December 21, 1933; that the latter part of May, 1932, when plaintiff was preparing to go to his home in Massachusetts, he mentioned the matter of attending Columbia University that summer; that the witness told him that, in view of the condition of the times and the conditions under which the college was operating, if he attended Columbia University he would have to do so at his own expense; that plaintiff stated that he wanted to co-operate and under the circumstances would "go along with them;" that he talked to plaintiff about December 15, 1932, and advised him that there had been a further depreciation in defendant's reserve fund and decrease in enrollment and payment of tuition fees; that he told plaintiff that things had reached a point where it had to be decided "whether he would prefer to lay off some of the instructors or keep them all on and divide up the money and reduce the rate paid each man;" that plaintiff stated as before that "he wanted to co-operate with us and that he would be willing to go along with the reduced income and keep all of the instructors on;" that the witness told plaintiff that the reduction would be about 15% in addition to the 20% reduction agreed to for the previous year; and that Hersey said he would co-operate and "go along with us on that basis."

Plaintiff's objection was sustained to defendant's offer to prove that the other eleven instructors were retained in its employ and that the 20% reduction was made on an even basis among all the instructors for the year ending May 31, 1932. His objection was also sustained to defendant's offer to prove the actual decrease from September, 1930, to September, 1931, and September, 1932, in receipts from tuition fees, in the enrollment of students and in the

for the year ending May 31, 1957, and 12,171 for the year ending May 31, 1958; that Harvey made no demand for the difference between what he received and the amount originally in his contract until he wrote the letter of December 31, 1957; that the 1957-58 year at May, 1958, when plaintiff was preparing to go to his home in Massachusetts, he mentioned the matter of attending Columbia University that summer; that the witness told him that, in view of his condition of the times and the conditions under which the college was operating, if he attended Columbia University in venia law in at his own expense; that plaintiff stated that he wanted to co-operate and under the circumstances would "go along with them" that he talked to plaintiff about between it, 1958, and obtained the last three and been a further depreciation in Columbia's reserve fund and increase in enrollment and payment of tuition fees; that to said plaintiff that things had reached a point where it had to be decided "whether he would prefer to lay off some of the instructors or keep them all on and divide up the money and reduce salaries pro rata;" that plaintiff stated as before that "he wanted to co-operate with us and that he would be willing to go along with the reduced income and keep all of the instructors on;" that the witness said plaintiff that the reduction would be about 12% in addition to the 20% reduction agreed to for the previous year; and that Harvey said he would co-operate and "go along with us on that basis."

Plaintiff's objection was contained in Columbia's offer to prove that the state higher institutions were prohibited in the matter and that the 12% reduction was made on an even basis among all the instructors for the year ending May 31, 1958. The objection was also sustained to Columbia's offer to prove the actual decrease from September, 1956, to September, 1957, and September, 1958, to receipts from tuition fees, in the enrollment of students and in the

value of the securities in the reserve fund which represented prepaid tuition fees.

Orian W. Grant, assistant to Morey, testified that after Morey presented the financial condition of defendant to the instructors at the meeting of October 29, 1931, Professor Black suggested that all the instructors agree to take a reduction in salary, and that when one of them asked how much it would be Morey answered approximately 20%; and that about a month after this meeting Morsey stated to him that "he would go along with the school rather than go back home, because he thought Morey would do the right thing - was doing all he could."

William G. Mundy, assistant treasurer of defendant, testified that Black proposed a reduction in the salaries of all the instructors to keep the business going and to preserve their jobs; and that there was no objection to the proposal. This witness was not permitted to testify as to the condition of defendant's finances, the relative size of the classes or as to whether the 20% reduction in salaries went into effect as to the eleven other instructors.

The other nine witnesses for defendant were fellow instructors of plaintiff, all of whom testified variously but in effect that, after Morey presented to the meeting on October 29, 1931, the detailed facts and figures as to the financial condition of the college, necessitating the cessation of business, dropping some of the instructors, or the reduction of the salaries of all of them, Professor Black moved, proposed, suggested or mentioned that each of the instructors agree to accept a reduction in salary in order to keep the college running and all of them employed, and that when President Morey asked if there were any objections, none was interposed; and that when Morey was asked at the meeting how much the reduction would be, he answered about 20%.

Instructor Fred Abbot Fielder testified that a few weeks

or a month after the meeting of October 29, 1931, in a conversation with plaintiff, the witness said to him, "the question of the reduction of 20% in our salaries and the fact that it would be difficult for us to maintain our living expenses on the reduced salaries and that we didn't like to have to do it, but we were going to have to take less salary - but I saw it looked as though the school would close, and I would rather take my chances on a reduced salary during the period in order that we might continue working as there was no possibility of getting a place outside in my profession at that time," and Hersey "agreed with me."

Instructor Clarence W. Dahl testified that shortly after the meeting of October 29, 1931, in a discussion with him about the salary reduction, plaintiff stated that "Mr. Morey was doing the right thing."

Defendant offered to prove by the nine instructors who testified that they each received the 20% reduction in salary which they agreed to accept, that they remained in defendant's employ for the entire school year ending May 31, 1932, and that they accepted their salaries as reduced in full payment of all that they had coming under their contracts for that year. Plaintiff's objection to this offer was in each instance sustained.

Plaintiff testified in rebuttal that "Mr. Morey presided at the meeting (October 29, 1931) and he put some figures on a board and discussed those figures, telling us - setting up the yearly budget - and that he felt probably that it would be necessary to make some adjustments * * * he called for suggestions from the faculty and Mr. Black suggested that perhaps the faculty should do what they could in the way of salaries to help out * * * and Mr. Morey asked if there were any other suggestions and there being none, he stated that he would discuss the situation over with the faculty individually;" that subsequent to this meeting Morey told him that

or a month after the meeting of October 24, 1971, in a correspondence with Plaintiff, the witness said to him, "The question of the reduction of 30% in our salaries and the fact that it would be difficult for us to maintain our living expenses on the reduced salaries and that we didn't like to have to do it, but we were going to have to take less salary - but I was at least in thought the second vote alone, and I would rather take my chances on a reduced salary during the period in order that we might continue working as there was no possibility of getting a place outside in my profession at that time", and Dorsey "agreed with me."

Instructor Clarence A. Hall testified that shortly after the meeting of October 24, 1971, in a discussion with him about the salary reductions, Plaintiff stated that "Mr. Dorsey was doing the right thing."

Defendant offered to prove by the also instructors who testified that they each received the 30% reduction in salary which they agreed to accept, that they remained in defendant's employ for the entire school year ending May 31, 1972, and that they accepted their salaries as reduced in full payment of all that they had coming under their contracts for that year. Plaintiff's objection to this offer was in each instance sustained.

Plaintiff testified in rebuttal that "Mr. Dorsey presided at the meeting (October 24, 1971) and he put some figures on a board and discussed those figures, telling us - setting up the faculty budget - and that he felt probably that it would be necessary to make some adjustments * * * he asking for suggestions from the faculty and Mr. Black suggested that perhaps the faculty should do what they could in the way of salaries to help out * * * and Mr. Dorsey asked if there was any other suggestions and there being none, he stated that he would discuss the situation over with the faculty individually." That subsequent to this meeting Dorsey told him that

his case was different and that defendant would carry out its written agreement with him; that about the latter part of May, 1932, Morey asked him to forego attendance at college for the summer, but finally agreed that he should go; that he asked for the balance due on his contract at that time, but nothing further was said by Morey; that in the latter part of December, 1932, Morey told him that he could pay his monthly salary installments at the same rate that he had been paying them, but that if the witness would agree to a temporary reduction in the monthly payments, defendant would pay the entire balance due on plaintiff's contract as soon as possible, and that under these conditions plaintiff agreed to accept monthly salary payments of $200 commencing with October, 1932.

Did the trial court err in excluding competent evidence offered by defendant? It has been repeatedly held that where one of the parties to a written contract refuses to perform because he is confronted by changed and burdensome conditions not known or anticipated by the parties when the contract was made, an oral modification of such contract by the parties is not without consideration and is binding upon them. (Bishop v. Busse et al., 69 Ill. 403; Cooke v. Murphy, 70 Ill. 96; Commercial Car Line v. Anderson, 224 Ill. App. 187; Schweickhardt v. Chessen, 329 Ill. 637.) The courts of every jurisdiction in the United States have taken judicial notice of the depression with its disastrous financial consequences to individuals and institutions of practically every kind and character, and surely in the light of the rule of law just stated defendant should have been permitted to prove the nature and extent of the precarious condition of its finances. The court's action in excluding this evidence was prejudicial to defendant.

In view of plaintiff's insistence that there was no oral agreement between the parties for a reduction of his salary the unanticipated impairment of defendant's finances, which was the

He was the difference and that difference would satisfy not the vision expressed with him; that even the fairer part of her, [illegible], Mary asked him to forgo discussion of college for the summer, but finally agreed that he should for once be case for the balance due on his vacation at that time, the painting transfer was said by Dorey; that in the latter part of December, [illegible] told him that he would pay his [illegible] monthly installments at the same rate that he had been paying them, but that if the [illegible] agree to a temporary reduction in the monthly payments, interest would pay the entire balance due on plaintiff's contract as soon as possible, and that under these conditions plaintiff agreed to accept monthly money payments of [illegible] commencing with October, 1921.

Did the trial court err in excluding competent evidence offered by defendant? It has been repeatedly held that where one of the parties to a action desires evidence to prove business be is conducted by manager and [illegible] conditions not known or anticipated by the parties when the contract was made, to oral modification of such contract by the parties is not without consideration and is binding upon them. (Ellery v. Ewers et al., 80 Ill. 283; Lewis v. Jordan, 72 Ill. 89; Commercial Ins Line v. Spring, 164 Ill. 149, 157; Schmelzenbach v. Hanson, 80 Ill. 477.) The terms of every individual in the United States have taken judicial notice of the expansion with the enormous financial consequences to individuals and institutions of practically every kind and character, and surely in the light of the rule of law just stated defendant should have been permitted to prove the nature and extent of the precarious condition of its finances. The court's action in excluding this evidence was prejudicial to defendant.

In view of plaintiff's instructions that there was no oral agreement between the parties for a reduction of its monthly payments, unscrupulous importunes of defendant's finances, which was the

alleged cause of its refusal to perform the original contract and which actuated the oral agreement of the parties to modify the written contract, was material and evidence concerning same was competent and should have been submitted to the jury for its consideration.

Defendant presented evidence that plaintiff accepted the reduced salary under the oral agreement between the parties until the expiration of his contract May 31, 1933, and that he made no claim for any balance due under his written contract until he wrote the letter to defendant on December 21, 1933. The defense, however, not only consisted of plaintiff's oral agreement with defendant to accept the reduced salary, but included the agreement of all the instructors with each other and defendant to accept reduced salaries because of the precarious financial condition of defendant in order to keep the school operating and all of the instructors in employment. We think that defendant was entitled to show the full scope of the oral agreement as alleged and that plaintiff was the only instructor who refused to abide by such oral agreement. The action of the trial court was, therefore, erroneous in excluding the evidence offered by defendant to show that each of the nine instructors who testified agreed to accept a reduction in salary, received a 20% reduction, remained in defendant's employ during the entire school year ending May 31, 1932, and accepted his salary as reduced in full payment for that year. This evidence was not only competent but material under the issues made up by the pleadings in this case. The mutual agreement of all the instructors to accept reduced salaries and the acceptance thereof by all of them, if shown, constituted a valid executed parol agreement, and it was highly prejudicial to defendant to refuse to admit evidence of the agreement and of the performance thereof by all of the parties thereto.

It is almost uniformly held that a mutual promise to con-

alleged cause of its refusal to perform the original contract and which constituted the oral agreement of the parties to modify the written contract, was material and evidence concerning same was competent and should have been admitted to the jury for its consideration.

Defendant strenuously argues that plaintiff accepted the reduced salary under the oral agreement between the parties until the expiration of his contract May 31, 1929, and that he made no claim for any balance due under his written contract until he wrote the letter of February 20, 1929. The defense, however, not only contended of plaintiff's oral agreement with defendant to accept the reduced salary, but included the agreement of all the instructors with such stand and defendant is being vehemently because of the gratuitous financial condition of defendant in order to keep the school operating and all of the instructors in employment. We think that defendant was entitled to show the full scope of the oral agreement as alleged and that plaintiff was the only instructor who refused to abide by such oral agreement. The motion of the trial court was, therefore, erroneous in excluding the evidence offered by defendant to show that each of the nine instructors who testified agreed to accept a reduction in salary, received a 20% reduction remained in defendant's employ during the entire school year ending May 31, 1929, and accepted his salary as reduced in full payment for that year. This evidence was not only competent but material under the issues made up by the pleadings in this case. The mutual agreement of all the instructors to accept reduced salaries and the acceptance thereof by all of them, if shown, constituted a valid executed oral agreement, and it was highly prejudicial to defendant to refuse it. Such evidence of the agreement and of the performance thereof by all of the parties thereto.

It is almost unfortunately that a mutual mistake in con-

tribute toward a common cause or undertaking is a sufficient consideration for a promise. In Connors v. Swords Co., 276 Ill. App. 318, where the question of a mutual agreement by officers of a corporation to accept reduced salaries was involved and the trial court refused to permit the defendant to show the acceptance by the plaintiff and all the other officers of a reduction in salary, the court held at p. 326:

"It is our opinion that the trial court erred in refusing to permit the appellant to make its offered proof, to show that by mutual agreement, the salaries of the various officers, including the appellee, had been voluntarily reduced, and accepted by them in payment for their salaries due them from the defendant company. The reduction of the salaries of the various officers was made for the benefit of the defendant company and said company had a right to maintain or defend its suit as against the claim of the appellee. A promise to accept a reduced salary and the acceptance of the same was an executed parole agreement and could be shown to defeat a recovery upon a written resolution passed by the board of directors fixing the appellee's salary at $10,000 per year. Yockey v. Marion, 269 Ill. 342."

See also Chicago Bank of Commerce v. Kraft, 269 Ill. App. 295; Globe Wernicke Co. v. Siegel, etc., 209 Ill. App. 529; National Time Recorder Co. v. Feypel, 93 Ill. App. 170.

So in this case defendant's theory is that all the instructors were confronted with a loss of employment; that their mutual agreement between each other and with defendant to accept the reduction in their salaries so as to keep the school open was for the benefit of each and all of them, as well as defendant; and that it was proper for defendant to show such mutual contract and its performance by all the instructors and defendant.

Defendant contends that the following instruction was erroneously given to the jury:

"The court instructs the jury that the burden is on the defendant to prove by the preponderance or greater weight of the evidence that the contract entered into between the plaintiff and defendant was modified or changed. When the court speaks of the preponderance of evidence in these instructions, such preponderance of evidence may not be necessarily determined by the number of witnesses testifying to a particular fact or set of facts in determining upon which side the preponderance of evidence is: you may also take into consideration the opportunity of the various witnesses for seeing and knowing the things about which they testified; their conduct and manner while testifying; their interest or lack of interest, the probability or improbability of the truth of

[illegible] insure a [illegible] to [illegible] is sufficient compensation for a [illegible]. In [illegible] v. [illegible], [illegible] App. 310, where the question of a mutual agreement by officers of a corporation to accept reduced salaries was involved, the trial court refused to permit the defendants to show the acceptance by the plaintiff and all the other officers of a reduction in salary, the court held as follows:

"It is our opinion that the trial court erred in refusing to permit the appellant to make its defense proof, to show that by mutual agreement, the salaries of the various officers, including the appellee, had been voluntarily reduced, and accepted by them in payment for their services due them from the defendant company. The reduction of the salaries of the various officers was made for the benefit of the defendant company and did not deprive the plaintiff of any right to salaries or defend its suit on account the claim of the appellee. A promise to accept a reduced salary and the acceptance of the same are material proofs (citation) and tends to show in effect a [illegible] upon a written resolution passed by the board of directors fixing the appellee's salary at $10,000 per year. [illegible] v. [illegible], 247 Ill. 248."

See also [illegible] v. [illegible], 207 Ill. App. [illegible]; [illegible] v. [illegible], 207 Ill. App. [illegible]; [illegible] v. [illegible], 93 Ill. App. 170.

We in this case defendant's money is that all the instructions were contended with a line of reasoning: that their mutual agreement between each other and all defendants to accept the reduction in their salaries so as to keep the council open was for the benefit of each and all of them, as well as defendants; and that it was proper for defendant to show such mutual contract and its performance by all the interveners and defendants.

Defendant contends that the following instruction was erroneously given to the jury:

"The court instructs the jury that the burden is on the defendants to prove by the preponderance or greater weight of the evidence that the contract entered into between the plaintiff and defendant was modified or changed. When the mere weight of the preponderance of evidence in these instructions, such preponderance of evidence may not be measured by the number of witnesses testifying to a particular fact or set of facts in controlling upon which side the preponderance of evidence lies you may also take into consideration the opportunity of the various witnesses for seeing and hearing the things about which they testified; their conduct and manner while testifying; their interest or lack of interest, the probability or improbability of the truth of

their several statements in view of all the other evidence, facts and circumstances proven on the trial, and from any or all of these circumstances, you may determine on which side the preponderance of evidence is."

We are of the opinion that the number of witnesses being an important factor in this case this instruction was erroneously given.

Where plaintiff's case rested solely upon his own testimony as it did here and twelve witnesses testified in defendant's behalf, the number of witnesses testifying for or against a proposition was a very important matter to be considered by the jury, and an instruction which ignores or omits the number of witnesses as an element to be considered is calculated to mislead the jury. (Yanlonis v. Spring Valley Coal Co., 185 Ill. App. 563, and cases cited therein.) This instruction not only does not include the number of witnesses as an element to be considered by the jury in determining where the preponderance of evidence lies, but intimates that the fact that by far the larger number of witnesses testified for defendant might be entirely disregarded. In Lyons v. Ryerson & Son, 242 Ill. 409, where a similar instruction was given, our Supreme court said at p. 417:

"It is further contended by the appellant that Instruction No. 2 given for appellee did not state a correct principle of law. It advised the jury that the preponderance in a case 'is not alone necessarily determined by the number of witnesses,' and then follows an enumeration of the matters proper to be considered by the jury, omitting however, the number of witnesses testifying for and against. In Chicago Union Traction Co. v. Hampe, 228 Ill. 346, and Elgin, Joliet & Eastern Ry. Co. v. Lawler, 229 id. 621, it was held that a similar instruction should not have omitted this element. In view of the fact that the appellee's case rested largely upon his own testimony and that more witnesses testified for appellant than for himself, this instruction might have misled the jury on this point."

No instruction was given to the jury which stated the law with reference to a mutual agreement by all the instructors with each other and with defendant and the performance thereof by all of the parties to such an agreement.

The court refused to give the two following instructions requested by defendant:

"No. 4. You are instructed that if you believe from the evidence that after the making of the written contract introduced

their general significance in view of all the other evidence, facts and circumstances given on the trial, and from any or all of these circumstances, you may determine on which side the preponderance of evidence is."

We are of the opinion that the number of witnesses testing on behalf of the plaintiff's case was considerably greater.

Where plaintiff's case rested mainly upon his own testimony as it did here and twelve witnesses testified in defendant's behalf, the number of witnesses testifying for or against a proposition was a very important matter to be considered by the jury, and on instructions which ignores or omits the number of witnesses as an element to be considered in weighing the jury. (Kaufman v. Spring Valley Beef Co., 188 Ill. App. 280, and cases cited therein.) This jurisprudence not only does not include the number of witnesses as an element to be considered by the jury in determining where the preponderance of evidence lies, but intimates that the fact that by far the larger number of witnesses testifying for defendant might be unfairly disregarded. In Lemon v. Kurtzman & Son, 411 Ill. 404, where a similar instruction was given, our Supreme court said at p. 417:

"It is further suggested by the appellee that instruction No. 2 given for appellee left out when a correct principle of law, it advised the jury that the preponderance in a case "is not alone necessarily determined by the number of witnesses," and that failing an enumeration of the matters proper to be considered by the jury, omitting however, the number of witnesses testifying for and against. In Chicago Union Traction Co. v. Lemon, 208 Ill. 168, and Illinois Telephone & Telegraph Co. v. Crosby, 216 Ill. 463, it was held that a similar instruction should not have omitted this element. In view of the fact that the appellee's case rested largely upon his testimony and that more witnesses testified for appellant than for himself, this instruction might have misled the jury on this point."

No instruction was given to the jury which stated the law with reference to a mutual agreement by all the instructions with such other and with defendant and the performance thereof by all of the parties to such an agreement.

The court refused to give the following instructions requested by defendant:

"No. 6. You are instructed that if you believe from the evidence that after the making of the written contract introduced

in evidence, the plaintiff and the defendant, by parol agreement modified the same by changing the salary for the second year from Three Thousand Nine Hundred Seventy ($3970.00) Dollars to Three Thousand ($3000.00) Dollars and by changing the salary for the third year from Four Thousand One Hundred Eighty ($4,180.00) Dollars to Two Thousand Four Hundred Seventy-five ($2,475.00) Dollars by mutual agreement between themselves, and between the other instructors, and that both parties performed said contract as so modified, then the parties are bound by the contract as thus modified and the plaintiff is not entitled to recovery."

"No. 9. You are instructed as a matter of law that where several persons agree to a common object which they wish to accomplish for their general advantage the promise of each is a good consideration for the promise of the others; and if you find and believe from all the evidence in this case that the plaintiff herein, together with several other instructors there employed by the defendant mutually agreed between themselves and all of them agreed with the defendant herein to change and modify their respective contracts with reference to the salary and that each and all of the instructors, including the plaintiff herein, agreed to accept and did accept a reduced salary, then in such event the agreement as modified is binding on all parties and the plaintiff cannot recover in this suit."

These instructions embody and present defendant's theory of its defense and the issue as raised by its affidavit of merits, and the court's refusal to state to the jury the law applicable to defendant's theory constituted reversible error.

In Home Bank & Trust Co. v. Szostowski, 247 Ill. App. 207, in discussing this question, the court said at p. 212:

"The evidence of plaintiff and defendant is in sharp conflict, and in such condition of the proofs it behooves the court to be correct in its instructions to the jury. The plaintiff bank had a right to have the jury instructed upon their theory of the case which the evidence proferred by them tended to prove, and to deny it such right was reversible error."

This case involved a claim for wages and plaintiff testified that at the time of the trial he was working for "the relief" in Massachusetts. In cases sounding purely in damages, where the evidence is conflicting, and especially where the facts are calculated to touch upon the feelings and the sympathies, the instructions to the jury should be clear, accurate and concise. (Chicago Union Traction Co. v. Miller, 212 Ill. 49; C. B. & Q. R. R. Co. v. Van Patten, 64 id. 510; West Chicago Street R. R. Co. v. Dougherty, 170 id. 379.)

in evidence, the plaintiff sue the defendant, by proof sufficient modified the case by showing the policy for not secure that item Thus Thomas the Jewish jewelry (1000.00) Smiley is from Thomas ($1000.00) Smiley sue by showing the policy for the said year from Tom Thomas the Junior Jiggy (14,150.00) Smiley to Tom Thomas Tom another Jiggy-Jim ($1,000.00) Smiley by mutual agreement between themselves, and without the other insurance, and that both policies contained all conditions to be modified, then the policies are bound by the product to that modified and the plaintiff is not entitled to recovery.'

'Ten. 3. You are instructed in a matter of law that there were several persons agree in a reason which they may also to agreeable for their general carriage the product of such to a good condition for the product of the original and of the and Smiley from all the evidence in this case that the plaintiff herein, together with several other insurance there required by the defendant mutually agreed between themselves and all of them agreed with the defendant herein to change and modify their respective contracts with reference to the policy and that such and all of the insurance, including the plaintiff herein, agreed to accept and did accept a renewal policy, then in such event the agreement so modified is binding on all parties and the plaintiff cannot recover in this suit.'

These instructions embody one present defendant's theory of the defense and the issue as raised by the affidavit of merits, and the court's refusal to submit to the jury the law applicable to defendant's theory constitutes reversible error.

In Home Bank & Trust Co. v. Kozlowski, 147 Ill. App. 447, in discussing this question, the court said at p. 452:

"The evidence of plaintiff and defendant is in sharp conflict, and in such condition of the proofs it behooves the court to be correct in the instructions to the jury. The plaintiff had a right to have the jury instructed upon their theory of the case which the evidence produced by them tended to prove, and to deny it such right was reversible error."

This case involved a claim for wages and plaintiff benefited that at the time of the trial he was working for "the relief in Massachusetts. In cases involving penalty in damages, where the evidence is conflicting, and especially where the facts are calculated to touch upon the feelings and the sympathies, the instructions to the jury should be clear, lucrative and concise. (Chicago Union Traction Co. v. Miller, 214 Ill. 49; C. B. & Q. R. R. Co. v. The Dalton, 64 Ia. 210; Yes Chicago Street R. R. Co. v. McDonald, 170 Ill. 329.)

Inasmuch as this case will in all probability be retried, we have purposely refrained from discussing the credibility of the witnesses or the weight of the evidence.

For the reasons stated herein the judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

Assumed an idle man will in all probability be arrested, he has apparently reflected less circumspectly the possibility of the alternative or the weight of the evidence.

For the reasons stated herein the judgment of the trial court is reversed and the cause remanded for a new trial.

DISSENTING OPINION.

Dissenting, Jr. J., and Fitzhugh, J., concur.

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38178

GEORGE R. BENSON, executor under the last will and testament of CATHERINE L. BENSON, deceased, et al., Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
MID-STATES MANUFACTURING COMPANY, a corporation, Appellant.	283 I.A. 646

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

October 15, 1934, judgment by confession was entered against defendant, Mid-States Manufacturing Company, in favor of George R. Benson, executor under the last will and testament of Catherine L. Benson, deceased, for $697.50, for six months rent and attorneys' fees, under the terms of a written lease executed August 18, 1932, by Catherine L. Benson, lessor, and defendant, as lessee. The rent at $100 a month was alleged to be due for the months from May, 1934, to October, 1934, inclusive. The lessor, Catherine L. Benson, died testate December 27, 1933, naming George R. Benson as her executor. By her last will and testament she devised her residuary estate, including the property in which the leased premises in question are located, to her four children, George R. Benson, Sr., Walter L. Benson, Sr., Ella Benson Eddy and Mildred Benson Davey, as co-trustees in trust for themselves as beneficiaries and for certain uses and purposes. George R. Benson, executor, and George R. Benson, Sr., one of the co-trustees, are one and the same person.

October 19, 1934, defendant filed a motion to vacate the judgment by confession, asserting that it did not "waive any rights

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GEORGE B. BUTCHER, receiver under
the last will and testament of
DATHORNE L. BENSON, deceased,
et al.,

Appellees,

v.

MID-STATES MANUFACTURING COMPANY,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

October 12, 1934, judgment by confession was entered against defendant, Mid-States Manufacturing Company, in favor of George B. Benson, executor under the last will and testament of Dathorne L. Benson, deceased, for $2,777.50, for six months rent and attorneys' fees, under the terms of a written lease executed August 15, 1932, by Dathorne L. Benson, lessor, and defendant, as lessee. The rent at $100 a month was alleged to be due for the months from July, 1934, to October, 1934, inclusive. The lessor, Dathorne L. Benson, died intestate December 27, 1933, naming George B. Benson as her executor. By her last will and testament she devised her residuary estate, including the property in which the leased premises in question are located, to her three children, George B. Benson, Jr., Victor E. Benson, Mrs. Ella Benson Eddy and Mildred Benson Tardy, as co-trustees in trust for themselves as beneficiaries and for certain uses and purposes. George B. Benson, executor, and George B. Benson, Jr., one of the co-trustees, are one and the same person.

October 19, 1934, defendant filed a motion to vacate the judgment by confession, asserting that it did not "waive any rights

which it may have to make a motion for leave to appear and defend in the event that this motion to vacate such judgment may be denied." This motion to vacate was supported by an affidavit which stated the facts heretofore set forth and that, "inasmuch as the claim on which the judgment by confession in this cause was entered was for rent subsequent to the death of the said Catherine L. Benson and for the period of May, 1934, to October, 1934, * * * said claim for rent, if any there may be due, is owned by the said George R. Benson, Sr., Walter L. Benson, Sr., Ella Benson Eddy and Mildred Benson Davey as co-trustees, and that George R. Benson, executor under the last will and testament of said Catherine L. Benson, deceased, is not the owner of said claim and is not entitled to take the judgment by confession therefor; that, therefore, the said judgment is void and should be vacated and set aside." Defendant's motion of October 19, 1934, to vacate the judgment by confession was denied by the trial court October 30, 1934.

November 8, 1934, defendant moved to vacate the order of October 30, 1934, denying its previous motion, and also to vacate the judgment by confession of October 15, 1934. November 8, 1934, the court on its own motion ordered "that plaintiff be and he is hereby given leave to amend the statement of claim and cognovit on the face thereof, and that all files and proceedings herein be amended so as to read, George R. Benson, executor under the last will and testament of Catherine L. Benson, deceased, and George R. Benson, Sr., Walter L. Benson, Sr., Ella Benson Eddy and Mildred Benson Davey, as trustees under the last will and testament of Catherine L. Benson, deceased," and denied defendant's motion to vacate the order of October 30, 1934, in and by which defendant's motion to vacate the judgment by confession had theretofore been denied.

November 13, 1934, defendant filed a motion to vacate the

which it may have in mind a motion for leave to appear and defend in the event that this motion to vacate such judgment may be denied." This motion to vacate was supported by an affidavit which stated the facts heretofore set forth and that, "because of the claim on which the judgment by confession in this cause was entered was for rent subsequent to the death of the said Catherine L. Benson and for the period of May, 1934, to October, 1934, * * * said claim for rent, if any there may be due, is owned by the said George R. Benson, Sr., Walter L. Benson, Jr., Ella Benson May and Milford Benson Serv as co-trustees, and that George R. Benson, deceased when his last will and testament of said Catherine L. Benson, deceased, is not the owner of said claim and is not entitled to make the judgment by confession therefor; that, therefore, the said judgment is void and should be vacated and set aside." Defendant's motion of October 12, 1934, to vacate the judgment by confession was denied by the trial court October 30, 1934.

November 8, 1934, defendant moved to vacate the order of October 30, 1934, denying its previous motion, and also to vacate the judgment by confession of October 12, 1934. November 8, 1934, the court on its own motion ordered "that plaintiff be and he is hereby given leave to amend the statement of claim and complaint on the face thereof, and that all title and proceedings herein be amended so as to read, George R. Benson, executor under the last will and testament of Catherine L. Benson, deceased, and George R. Benson, Jr., Walter L. Benson, Jr., Ella Benson May and Milford Benson Serv, as trustees under the last will and testament of Catherine L. Benson, deceased," and denied defendant's motion to vacate the order of October 30, 1934, in and by which defendant's motion to vacate the judgment by confession had theretofore been denied.

November 12, 1934, defendant filed a motion to vacate the

judgment by confession of October 15, 1934, as amended by the court November 8, 1934, by adding the co-trustees as parties plaintiff. This motion was supported by the affidavit of one of defendant's counsel, which, after relating all the facts and proceedings heretofore set forth, averred that the "said claim for rent belongs to said co-trustees and not to George R. Benson, executor * * * and said co-trustees," and that "the said premises herein involved have not been sold to pay claims against the estate of Catherine L. Benson and no application to sell same has been filed in the Probate court, and said premises still belong to the said co-trustees; therefore, the said George R. Benson, executor, * * * and the said co-trustees did not on October 15, 1934, or at the date hereof, or at any time between said dates, own the said claim for rent and had no authority to confess a judgment therefor." Defendant's motion of November 13, 1934, to vacate the judgment by confession of October 15, 1934, as amended November 8, 1934, was denied by the court's order November 27, 1934. It is from this last order that defendant prosecutes this appeal.

May 31, 1935, plaintiffs presented a motion to this court to dismiss defendant's appeal on the ground that it was not taken in apt time. This motion, which was reserved to hearing, is denied at this time because defendant's notice of appeal from the order of November 27, 1934, was filed February 23, 1935, which was well within the ninety days allowed by the Civil Practice act.

The rent upon which this claim is based, and for which the judgment was confessed, accrued after the death of the testator. Rent accruing out of land upon a lease granted by the owner in fee and which does not become due until after the death of the lessor is a chattel real, which descends to the heir as a part of the inheritance and does not go to the executor. The heir alone can recover

Judgment by default on October 12, 1934, as amended by the court November 6, 1934, by adding the co-trustees as parties plaintiff. This motion was supported by the affidavits of one of defendant's counsel, which, after relating all the facts and proceedings heretofore set forth, averred that the "said claim for rent belongs to said co-trustees and not to George E. Benson, executor & c & and said co-trustees," and that "the said premises herein involved have not been paid to any claimant against the estate of Catherine E. Benson and no application to sell same has been filed in the Probate court, and said premises still belong to the said co-trustees, therefore, the said George E. Benson, executor, & c & and the said co-trustees did not on October 12, 1934, or at the date hereof, or at any time between said dates, own the said claim for rent and had no authority to confess a judgment therefor." Defendant's motion of November 12, 1934, to vacate the judgment by confession of October 12, 1934, as amended November 6, 1934, was denied by the court's order November 27, 1934. It is from this last order that defendant prosecutes this appeal.

May 23, 1935, plaintiffs presented a motion to this court to dismiss defendant's appeal on the ground that it was not taken in apt time. This motion, which was reserved to hearing, is denied at this time because defendant's notice of appeal from the order of November 27, 1934, was filed February 22, 1935, which was well within the ninety days claimed by the first version cum.

The rent upon which this claim is based, and for which the judgment was confessed, accrued after the death of the testator. Such accruing out of land upon a lease granted by the owner in fee and which does not become due until after the death of the lessor is a useful tool, which belongs to the heir as a part of the inheritance and does not go to the executor. The heir alone can recover

such rent. (Green v. Massie, 13 Ill. 363.)

In this case the property in which the leased premises were located was devised to the four trustees. It is urged by defendant, and it is unquestionably the law, that the right to recover rent which accrued after the testator's death under her lease with defendant vested immediately upon her death in the trustees and that the action for the rent should have been brought and the judgment confessed in their favor. While it is true that the executor had the discretionary power to sell so much of the real property belonging to the decedent's estate as might be necessary to pay debts, taxes or legacies, the devisees under the will took the title to the land subject to the possibility that it might be taken from them in order to pay such debts, taxes or legacies. Until proper steps were taken in the Probate court to sell the land for such purposes, and none was taken, the title remained in the co-trustees, who were the devisees. A mere naked or contingent power to sell does not give an executor a right to the rents and profits, but in such cases the heirs or devisees may enter upon the estate and receive all rents and profits until such power to sell is appropriately exercised. (24 C. J., 139, 140.)

This action was improperly brought by George R. Benson as executor, and the judgment was improperly confessed in his favor. Defendant's warrant of attorney authorized the entry of a judgment by confession in favor of the person or persons rightfully entitled thereto, and when the court was sufficiently advised November 8, 1934, within thirty days of the entry of the judgment, that the trustees were the proper parties plaintiff rather than George R. Benson as executor, it was its duty to permit the trustees to become parties. This the court did, but the trial judge did not go far enough. He permitted the executor to remain in the case as one of

such year. (Brown v. Dennis 12 Cl. 544.)

In this case the property in which the legal problem was located was devised to the four trustees. It is urged by defendant, and it is unquestionably the law, that the right to possess that which accrued after the testator's death under her lease with defendants vested immediately upon her death in the trustees and that the motion for the rent should have been brought and the judgment confessed in their favor. While it is true that the executor had the discretionary power to sell so much of the real property belonging to the decedent's estate as might be necessary to pay debts, taxes or legacies, the devisees under the will took the title to the land subject to the possibility that it might be taken from them in order to pay such debts, taxes or legacies. Until payment might be taken in the probate court to sell the land for such purposes, and was taken, the title remained in the co-trustees, who were the devisees. A mere naked or contingent power to sell does not give an executor a right to the rents and profits, but in such cases the heirs or devisees may enter upon the estate and receive all rents and profits until such power to sell is effectively exercised. (34 C. J. 1, 120, 122.)

This action was improperly brought by George E. Jones as executor, and the judgment was improperly confessed in his favor. Defendant's account of rents authorized the entry of a judgment by confession in favor of the person or persons rightfully entitled thereto, and when the court was sufficiently advised November 6, 1924, within thirty days of the entry of the judgment, that the trustees were the proper parties finally rather than George E. Jones as executor, it was its duty to permit the trustees to assume parties. This the court did, but the trial judge did not go far enough. He permitted the executor to remain in the case as one of

the plaintiffs when he had no right in the case at all. The court should have ordered the substitution of the trustees as parties plaintiff in the place and stead of the executor, with an appropriate amendment of all the pleadings, files and proceedings. Its failure to drop the executor as a party plaintiff does not, however, warrant the vacation of the judgment. No action shall be defeated by non-joinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped by order of the court at any stage of the cause, before or after judgment, as the ends of justice may require. (Sec. 26, Civil Practice act, ch. 110, Ill. State Bar Stats., 1935.)

In none of defendant's many motions has it questioned the validity of the lease or denied its occupancy of the premises or that it is fairly indebted under the lease for such occupancy. In its original motion of October 19, 1934, to vacate the judgment by confession it reserved the right to ask the court for leave to appear and defend on the merits, in the event its motion to vacate the judgment was not allowed on the ground urged. Nowhere does it appear in the record that thereafter defendant requested an opportunity to defend the cause on the merits. It is even said by plaintiffs' counsel in his brief, and not denied, that the court asked defendant's counsel "if they desired to plead to the merits" and that they "refused to do so." There is merit, however, in defendant's contention that it was not incumbent upon it to plead to the merits unless the plaintiff or plaintiffs were proper parties and had the right to recover in this proceeding.

Inasmuch as the co-trustees were the only proper parties to confess judgment in this cause the order of the Municipal court of November 27, 1934, is reversed and the cause remanded with directions to vacate that portion of the order of November 8, 1934, which granted leave to amend all pleadings, files and proceedings in the cause by adding the

the plaintiffs when he had no right in the case at all. The court should have ordered the substitution of the trustee as parties plaintiff in the place and stead of the trustee, with an appropriate amendment of all the pleadings, files and proceedings. Its failure to deny the amendment on a proper plaintiff does not, however, warrant the vacation of the judgment. It action should be defeated by non-joinder or misjoinder of parties. The parties may be added and parties misjoined may be dropped by order of the court at any stage of the cause, before or after judgment, as the ends of justice may require. (Sec. 26, Civil Practice act, ch. 110, Ill. Stats Ann Stats., 1933.)

In case of defendant's many motions has it questioned the validity of the issue or denied its sufficiency of the pleadings or that it is fatally included under the issue for such sufficiency. In its original motion of October 17, 1934, to vacate the judgment by confession it reserved the right to ask the court for leave to appear and defend on the merits, in the event the motion to vacate the judgment was not allowed on the ground urged. Nowhere does it appear in the record that Interpleader defendant requested an opportunity to defend the cause on the merits. It is even said by plaintiff's counsel in his brief, and not denied, that the court asked defendant's counsel "if they desired to plead to the merits" and that they "refused to do so." There is merit, however, in defendant's contention that it was not incumbent upon it to plead to the merits unless the plaintiff or plaintiffs were proper parties and had the right to recover in this proceeding.

Inasmuch as the co-trustees were the only proper parties to contest judgment in this cause the order of the Municipal court of November 27, 1934, is reversed and the cause remanded with directions to vacate that portion of the order of November 8, 1934, which granted leave to amend all pleadings, files and proceedings in the cause by making the

four trustees as additional parties plaintiff, and with further directions to enter an order substituting George R. Benson, Jr., Walter L. Benson, Jr., Ella Benson Eddy and Mildred Benson Davey as trustees under the last will and testament of Catherine L. Benson, deceased, as parties plaintiff in the place and stead of George R. Benson, executor under the last will and testament of Catherine L. Benson, deceased, with the amendment of all pleadings, files and proceedings in the cause to like effect. It is also directed that defendant be granted leave to plead to the merits within a reasonable time and defend, if it sees fit to do so, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

their knowledge of antibiotics positive identity, and with further directions to raise an which constituting things to change, Dr. Alfred L. Benson, Jr., this Bureau that had taking Dangerous drugs under the last will and testament of Jacques L. Benson, deceased, on partial identity in the place and stead of George K. Benson, executor under the last will and testament of Catherine L. Benson, deceased, with the assistance of all pleadings, files and proceedings in the cause in like effect. It is also directed that individual of greater lower to stand in the matter within a reasonable time and order, if it seem fit to do so, the judgment to stand as security.

INTERIOR: DEPARTMENT WITH DIRECTORS.

Indian, T. J., and Tribe, E., Source.

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L. L. BUSTER,
Appellee,

v.

INDIANAPOLIS LIFE INSURANCE COMPANY, a corporation, and PARKER & FINNEY, Inc., a corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

283 I.A. 646

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendants, Indianapolis Life Insurance Company, a corporation, owner of the building known as "The Brookmont Hotel," at 3953 South Michigan avenue, Chicago, and Parker & Finney, Inc., which managed and operated the hotel, seek to reverse a judgment for $90 rendered against them in an action brought by plaintiff, L. L. Buster, for damages for the loss of clothing and other property alleged to have been stolen from his room. The case was tried by the court without a jury.

Plaintiff testified that he was a permanent resident of the hotel and had been since August 6, 1932, paying $16 a month for his room; that he voted from the hotel address and was active in politics in the ward in which the hotel was located, having served as secretary to his ward committeeman until December 17, 1934, when he was appointed to a position in the office of the Cook county assessor; that on the evening of September 11, 1934, he left his room about 7:30 p.m., and, after locking the door and leaving his room key at the hotel desk, went to a meeting a few blocks distant; and that he returned to his room between 11 and 11:30 p.m. that same evening and found that certain of his clothing and other property had been stolen. No evidence was introduced by plaintiff to show negligence on the part of defendants or their employees.

The evidence further disclosed that the door to plaintiff's room had been equipped with a pick-proof Yale lock just a few weeks before the loss occurred; that there were only three keys to this lock, one which plaintiff used and left at the hotel desk, a pass-key which the maid obtained from the housekeeper every morning and returned to her every evening between 4 and 5 o'clock, when she finished cleaning the room, and a pass-key which the hotel manager carried.

Defendants contend that plaintiff was not a guest but a lodger or permanent resident and that, therefore, they cannot be held liable for the loss of his property.

Plaintiff's theory is that the relationship of innkeeper and guest existed between defendants and him and that they are liable to him as insurer.

Buster alleged in his statemnnt of claim that he was a traveler and as such was received into defendants' hotel on December 11, 1934. This coupled with the avermont of the loss of his property from his locked room stated a good cause of action, but plaintiff not only wholly failed to show that he was a guest but, on the contrary, testified that he had lived continuously at defendants' hotel since August, 1933, and that it was his permanent residence.

By making the Brockmont Hotel his permanent residence he became a boarder or lodger as distinguished from a guest, and a resident as distinguished from a transient or traveler. A guest has a permanent residence elsewhere than the hotel at which he is staying, while a boarder or lodger has his residence at the hotel.

In Mann v. Yarian, 147 Ill. App. 383, it was said: "A wayfaring man ceases to be a guest only when he takes up a permanent abode at an inn. He then becomes a boarder and loses his standing as a guest." This court again distinguished between a hotel guest and a boarder or lodger in Gross v. Saratoga European Hotel, 176 Ill. App. 160, where the court said, at p. 162:

The evidence further disclosed that the room in plaintiff's room had been equipped with a pick-proof lock just a few weeks before the loss occurred; that there were only three keys to this lock, one which plaintiff kept on his person at the Hotel Jewel, a pass-key which he had obtained from the housekeeper every morning and returned to her every evening between 4 and 5 o'clock, after the janitress cleaning the room, and a pass-key which the hotel manager retained.

Defendants contend that plaintiff has not a valid lien or a lien of paramount priority and that, therefore, they cannot be held liable for the loss of his property.

Plaintiff's theory is that the relationship of innkeeper and guest existed between defendants and him and that they are liable to him as insurers.

Bates alleged in his statement of claim that he was a traveler and as such was received into defendants' hotel on November 11, 1934. This coupled with the evidence of the loss of his property from his locked room stated a good cause of action, but plaintiff has only shown failed to show that he was a guest but, on the contrary, testified that he had lived continuously at defendants' hotel since August, 1933, and that it was his permanent residence.

By making the Brochure, Bates had his permanent residence he became a boarder or lodger on distinguishes from a guest, and a reviewer as distinguished from a transient or lo-order. A guest but a permanent residence elsewhere than the hotel at which he is staying, while a boarder or lodger has his residence at the hotel.

In Dunn v. Pelton, 147 Ill. App. 88, it was held: "A wayfaring man seems to be a guest only when he takes on a permanent lodgin at an inn. He then becomes a boarder and loses the character as a guest." This court again distinguished between a hotel guest and a boarder or lodger in Dunn v. Lorraine Hotelgue Co., 171 Ill. App. 181, where the court said, at p. 182:

"This Court is on record in Moon v. Yariam, 147 Ill. App. 383, as holding to the doctrine which we believe is the better and accepted one, that a weekly rate and length of stay do not, in the absence of taking up a permanent abode at a hotel, take away from a person the status of 'hotel guest.'"

The crucial question involved here is whether or not plaintiff was a permanent resident of the hotel or a guest. As to guests, the liability of innkeepers approximates that of insurers, but before such liability may be imposed the relationship of innkeeper and guest must be established. As to a boarder or lodger, a boarding or lodging house keeper is held only to the use of ordinary care in relation to property of a boarder or lodger left in his room during his absence from the hotel. In Grey v. Drexel Arms, 146 Ill. App. 604, where the facts were almost identical with the facts here, the court said, at pp. 606 and 607:

"In our opinion the evidence established the relation between the plaintiff and defendant as that of boarder and boarding house keeper or lodger and lodging house keeper, and that the relation of guest and innkeeper did not exist. Hale on Bailments and Carriers, 267, 272; Clifford v. Stafford, 145 Ill. App. 247, and authorities there cited.

"Such being the relation of the parties there was, at most, only a bailment of the property for mutual benefit, and the defendant could only be held to the use of ordinary care in relation to the property of the plaintiff left in her room during her absence from the hotel. Cooley on Torts, pp. 761, 762; Hale on Bailments and Carriers, 242.

"There is no evidence in the record of negligence on the part of the defendant, plaintiff in error, either in the care of the room or the property therein during the absence of the plaintiff or in the employment of its servants."

Plaintiff by his own evidence established his status as that of lodger and permanent resident of the hotel and not that of a guest. To recover from defendants for the loss of his property it was incumbent upon him to show that defendants or their employees were guilty of negligence in regard to same. As heretofore stated, plaintiff did not introduce or attempt to introduce any evidence of negligence on the part of defendants or their employees and he has, therefore, failed to prove their liability for his loss.

That the relationship of innkeeper and guest existed between

"This court in an record in Ross v. Irving, 147 III. App. 322, on holding in the doctrine which is relative to the burden and everybody one, that a reality rule and length of stay do not in the absence of having up a warrantee check on a hotel, take away from a person the status of 'house guest.'"

The crucial question involved here is whether or not plaintiff was a permanent resident of the hotel or a guest. In so grants, the liability of innkeepers corresponds that of insurers, but before such liability may be imposed the relationship of innkeeper and guest must be established. As to a boarder or lodger, a innkeeper or lodging house keeper is held only to the use of ordinary care to protect the property of a boarder or lodger left in his room during his absence from the hotel. In Ross v. Irving, 246 Ill. App. 404, where the facts were almost identical with the facts here, the court said, at pp. 406 and 407:

"In our opinion the evidence preponderates the relation between the plaintiff and defendant as that of boarder and boarding house keeper or lodger and lodging house keeper, and that the relation of guest and innkeeper did not exist. With no judgment and decision, 147, 272; Pittfield v. Chatham, 324 Ill. App. 147, and authorities there cited.

"Such being the relation of the parties there was, at most, only a bailment of the property for mutual benefit, and the defendant would only be held to the use of ordinary care in relation to the property of the plaintiff left in her room during her absence from the hotel. Conley v. Ivers, 23- Pa. 391; Ohio ex Dallenbach and Chatham, 223.

"There is no evidence in the record of negligence on the part of the defendant, plaintiff in error, either in the loss of the rings or the property therein needing the exercise of the plaintiff or in the employment of its servants."

Plaintiff by his own evidence establishes his status as that of lodger and permanent resident of the hotel and not that of a guest. To recover from defendants for the loss of his property it was incumbent upon him to show that defendants or their employees were guilty of negligence in regard to same. As proprietors (hotel, plaintiff did not introduce or attempt to introduce any evidence of negligence on the part of defendants or their employees and so the, therefore, failed to prove their liability for his loss.

That the relationship of innkeeper and guest existed between

defendants and other persons in the hotel could not alter or affect the relation of plaintiff and the hotel as permanent resident and lodging house keeper. (Williams v. Webster Hotel Company, 315 Ill. 64; Clifford v. Stafford, 145 Ill. App. 247.)

For the reasons stated herein the judgment of the Municipal court is reversed and judgment is entered here on the undisputed facts in favor of defendants and against plaintiff.

REVERSED AND JUDGMENT HERE IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF.

Scanlan, P. J., and Friend, J., concur.

defendants and other persons in the land would not alter or affect the relations of plaintiff and the heirs as presumptive tenants and heirlike owner hereof. [illegible] v. [illegible], 224 Ill. 601; Bullard v. Bullard, 247 Ill. [illegible].

For the reasons above herein the judgment of the municipal court is reversed and judgment is entered here on the motion in favor of defendants and against plaintiff.

REVERSED AND JUDGMENT HERE IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF.

Tomlins, P. J., and Friend, J., concur.

38326

ANNA SABINEC,
Appellee,

vs.

SIDNEY JACK WINTER,
Appellant.

Appeal from the
Circuit Court,
Cook County.

283 I.A. 646

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $2,000 rendered on the verdict of a jury January 9, 1933, against defendant, Sidney Jack Winter, in an action brought by Anna Sabinec, plaintiff, for personal injuries received by her at the hands of plaintiff's eight year old son. No question is raised on the pleadings.

Plaintiff was employed as a servant, doing general housework in defendant's home at 7352 Constance avenue, Chicago, Illinois. The defendant's sons, Leland and Herbert, who were eighteen and eight years old, respectively, at the time of the occurrence, occupied the same bedroom on the second floor of their father's home, adjoining which was a closet wherein there was kept an air rifle, exposed to view and readily accessible. About 5 P. M. August 4, 1932, defendant's son Herbert brought a companion, Frank Morris, to his room to play. In the course of their play Herbert removed the air rifle from the closet and either deliberately or accidently discharged same, the BB shot impelled therefrom striking plaintiff, who was either in her own bedroom nearby or passing along the hall, and inflicting serious and permanent injury to her right eye.

Defendant's theory is that he did not furnish the gun to his minor son; that the gun was owned by his older son, Leland; that he had no knowledge of the existence of the gun in his home; and that therefore the requisites for imposing liability on him for his son's tort are lacking.

Plaintiff's theory is that defendant is liable for the injuries suffered by her because he furnished his minor son with the BB gun and ammunition or knew that the gun was accessible to such minor

This cause comes on for trial on the issues
presented on the verdict of a jury in favor of the defendant
and, Harry Jack Wright, in an action brought by the Minnesota, plain-
tiff, for personal injuries received in the use of the Smith of plain-
tiff's eight year old son. No question is raised on the pleadings.

Plaintiff was employed as a servant, John Jackson,
housework in defendant's home at 1720 Dearborn avenue, Chicago,
Illinois. The defendant's sons, Lionel and Herbert, who were eighteen
and eight years old respectively, at the time of the occurrence, re-
mained six weeks before on the second floor of their father's home,
adjoining which was a dozen wooden stone was left on air rifle, ex-
posed to view and readily accessible. About 2 p. m. August 7, 1913,
defendant's son Herbert brought a companion, Frank Morris, to his room
to play. In the course of their play Herbert removed the air rifle
from the closet and either deliberately or accidentally discharged some
the so most improper insertion striking plaintiff, who was sitting in
her own backyard nearby or playing along the hall, and inflicting serious
and permanent injury to her right eye.

Defendant's theory is that he did not furnish the gun
to his minor son; that the gun was owned by his elder son, Lionel; that
he had no knowledge of the existence of the gun in his home; and that
therefore the requisites for imposing liability on him for his son's
tort are lacking.

Plaintiff's theory is that defendant is liable for the
injuries suffered by her because he furnished his minor son with the
air gun and ammunition at time that the gun was accessible to such minor

son, who was unskilled in its use.

Defendant contends that the verdict is manifestly against the weight of the evidence; that the court erred in refusing to allow his motion for judgment non obstante veredicto; and that the court erred in refusing to give the instruction tendered by him regarding the duty of plaintiff to prove her case by a preponderance of the evidence.

It is urged that, inasmuch as the verdict of the jury was based upon the evidence of the plaintiff alone and her evidence was contradicted by that of defendant, who was corroborated by other witnesses, such verdict is against the manifest weight of the evidence and to support this contention defendant relies principally upon Peaslee v. Glass, 61 Ill. 94, and Dick v. Swenson, 137 Ill. App. 68.

In the Peaslee case the court said at p. 94:

"It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached, and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must set aside one resting only upon the evidence of the plaintiff when that is contradicted not only by the defendant but also by another witness, and there are no elements of probability to turn the scale."

It will be noted that in the Peaslee case the court includes in the rule enunciated the element "testifying to a state of facts equally probable" where the issue rests upon the sworn affirmation of the plaintiff and the sworn denial of the defendant, and that, even where the evidence of the plaintiff stands alone and is contradicted by that of defendant and another witness, this opinion holds that a verdict for plaintiff may be sustained if there are "elements of probability to turn the scale."

Discussing this question in Hately v. Kiser, 163 Ill. App. 543, this court said at pp. 558 and 559:

son, who was unknown to his use.

Defendant contends that the verdict is manifestly against the weight of the evidence, that the court erred in refusing to allow his motion for judgment [illegible] and that the court erred in refusing to give the instructions tendered by him regarding the duty of plaintiff to [illegible] by a preponderance of the evidence.

It is argued that, inasmuch as the verdict of the jury was based upon the testimony of the plaintiff-libelee and her witness was contradicted by that of defendant, who was corroborated by other witnesses, such verdict is against the manifest weight of the evidence and it behooves this contention [illegible] upon Dunlap v. Dunn, 61 Ill. App. 69, and Tick v. Tucker, 147 Ill. App. 88.

In the Dunlap case the court said at p. 71:

"It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue turns upon the mere affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached, and therefore on a state of facts equally probable, a preponderance can not only say that the plaintiff has failed to establish his claim. Courts saying that this court would not make a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must not make our reading only upon the evidence of the plaintiff when that is contradicted not only by the defendant but also by another witness, and there is absence of probability to sustain the claim."

It will be noted that in the Dunlap case the court indulges in the rule enunciated the phrase "testifying to a state of facts equally probable" where the issue rests upon the sworn affirmation of the plaintiff and the sworn denial of the defendant, and that, even where the evidence of the plaintiff stands alone and is contradicted by that of defendant and another witness, this opinion holds that a verdict for plaintiff may be [illegible] there are "elements of probability to sustain the claim."

Commenting this question in Dunlay v. Kidd, 101 Ill. App. 241, this court said at pp. 246 and 247:

"Peaslee v. Glass, 61 Ill. 94, and cases in this court in which language from that case has been quoted are cited to us, as they often are in support of the position that where plaintiff and defendant directly contradict each other without corroboration on either side on the essential basis of a case, there can be no preponderance of evidence sufficient to justify a verdict for the plaintiff, which should consequently be set aside. Whatever may have been at any time said in opinions of this court applied to the facts of the particular case, it is clear that neither the decision in Peaslee v. Glass, nor even the dictum of the learned judge who wrote the opinion, is ground for the declaration of any such universal rule. We still hold, as Judge McAllister said in Herring v. Portis, 6 Ill. App. 308: 'It will not do to say as a matter of law that there can be no preponderance of the evidence in favor of the party holding the affirmative when there are but two ' (opposed) 'witnesses upon the facts in issue.'"

As to the case of Dick v. Swenson, supra, the facts are distinguishable from the facts here and, while the court may have reached a correct conclusion on the law and the facts in that case, we cannot agree with its bald statement that "when the verdict rests solely on the uncorroborated testimony of the plaintiff, contradicted by that of the defendant, whose testimony is corroborated by other witnesses, it cannot be sustained," as ever having been the law in this state.

The controlling issue of fact the jury in this case was called upon to decide was whether or not the defendant kept or allowed to be kept or knew or by the exercise of ordinary care could have known that there was an air rifle in his home, and knew or by the exercise of ordinary care could have known that same was accessible to his minor son, who was unskilled in the use of such a firearm.

Plaintiff testified that during the entire year she was in the employ of defendant the air rifle stood on the floor of the closet off the bedroom occupied by defendant's eight year old son and that on many occasions she saw the boy with the gun in the presence of his father and mother. The older boy, Leland, stated that his mother gave him the gun when he was about nine years old and that he used it until about a year before his brother shot plaintiff. He also said the he was not certain if his father knew he had the gun and that he did not want him to know it. Defendant denied that he ever saw the gun in the possession of his eight year old son; that he ever knew that the gun

the

was in his home; and that he ever saw the gun on his premises or in the possession of the older boy Leland. A careful consideration and analysis of all the evidence discloses that defendant's professed lack of knowledge of the presence of the gun in the closet or even in his home stands absolutely uncorroborated. All that can be gleaned from his son Leland's testimony was that he did not know whether or not his father had knowledge of the gun, and the eight year old son, Herbert, simply said that he did not play with or exhibit the gun in his father's presence. The gun was in the home for nine years and admittedly used by Leland during eight years of that time. In the face of the evidence of defendant and his sons, the jury had to and we have to believe either that defendant's wife and sons cleverly and cunningly deceived him about the gun or that his testimony as to lack of knowledge of the gun in his home was not only highly improbable but well nigh unbelievable. The jury was not only justified in considering the element of probability, but it was its duty to do so. Leland was given the gun when he was nine years old by his mother, with permission to use it. Is it unreasonable to infer from all the facts and circumstances in evidence that the defendant permitted eight year old Herbert to play with it?

The evidence was conflicting and it was clearly up to the jury to determine the issues of fact. It saw and heard the witnesses and gave credit to the testimony of plaintiff rather than to the testimony of defendant and his witnesses. In doing so we cannot say its verdictwas unjustified. The mere fact that a greater number of witnesses were called by the defendant than by the plaintiff is not of itself sufficient to set aside the verdict as being against the manifest weight of the evidence.

If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside when there is a contrariety of evidence if the facts and circumstances by a fair and reasonable intendment will authori%e the jury's finding.

(Illinois Central Railway Company v. Gillis, 49 Ill. 317; Bradley v. Palmer, 193 id. 15; Garney v. Thredy, 295 id. 78; Blackburn v. James, 304 id. 586; People, ex rel Insurance Co. v. Swan, 241 id. App. 189; Roth v. Fleck, 242 Ill. App. 195.)

It has repeatedly been held that the question of preponderance of the evidence does not arise at all in this court and that the law we can only disturb the verdict of a jury when it is clearly against the manifest weight of the evidence. In the opinion in Mills & Co. v. Duke, 232 Ill. App. 277, written by Mr. Justice O'Connor, this court said at p. 280:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from reading of the printed page of the record appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review. This being the law, of course, we cannot disturb the verdict of the jury in the instant case.

"Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt, a judgment of conviction will not be reversed merely because only the complaining witness testifies to the commission of the crime and he is contradicted by the defendant. The People v. Greenberg, 303 Ill. 548; The People v. Maciejewski, 294 Ill. 540; The People v. Boetcher, 298 Ill. 580."

In Bowers v. Reflebower, 243 Ill. App. 129 where the court refused to reverse a judgment entered on the verdict of the jury for plaintiff, whose case rested solely upon his own testimony and was contradicted by three witnesses for the defense, the court said at p. 135:

"The one witness may be supported by the facts and circumstances in the case to such an extent that his testimony induces a belief that it is reasonable and probable, while that of the other witnesses does not produce such a belief. The weight of the testimony is for the jury. They have no right to arbitrarily disregard the testimony of unimpeached witnesses, yet they are to consider such testimony in connection with all the facts and circumstances in evidence and give it such weight as it is entitled to."

(See also People v. Turek, 277 Ill. 321; People v. Schanda, 332 Ill. 38; Goldstein v. Buller, 189 Ill. App. 145; Irasa v. Robbins, 188 Ill. App. 198; Siese v. Samsula, 187 Ill. App. 198; Chicago Union Traction Company

v. O'Donnell, 113 Ill. App. 259.)

Without passing upon defendant's right to move for a judgment non obstante veredicto when he had made no motion to direct a verdict, in our opinion defendant's contention that the trial court erred in denying his motion for judgment non obstante veredicto is without merit in view of the fact that the verdict is not against the manifest weight of the evidence.

It is next urged that the trial court's refusal to give to the jury the following instruction requested by defendant constituted prejudicial error:

"The court instructs the jury that the plaintiff must prove her case by the preponderance or greater weight of the evidence, and if she has failed to do so, you should find a verdict for the defendant, regardless of all other questions in that case; or if the evidence is equally balanced, that is, if the evidence on behalf of the defendant weights as heavy as that on behalf of the plaintiff, or if it preponderates in favor of the defendant, or if you are unable to determine upon which side is the greater weight or preponderance of the evidence, then you should find the defendant not guilty."

The rule as to the burden of proof and the amount of proof required of a plaintiff before he can recover in a civil case is, we think, elementary. No instruction covering these principles was given by the court and defendant had a right to demand a proper instruction on the subject. Was the instruction offered by him and refused by the court a correct exposition of the law?

It is true that it included propositions of law upon which he had a right to have the jury instructed, but it went further and was not merely imaptly drawn but contained language which was misleading and calculated to mislead the jury. After stating that "the plaintiff must prove her case by the preponderance * * * of the evidence" it went on to state that "if she has failed to do so" a verdict should be returned for defendant "regardless of all other questions in the case." The inclusion in the instruction of the language "regardless of all other questions in thecase" immediately following the words "you should find a verdict for defendant," might be construed as an intimation to the jury that even though matters submitted to it were unfavorable to defendant, the

jury might disregard them and still find for him. The instruction did not state what questions the jury was bound to consider and what questions it might disregard. It is fair to assume that the trial court permitted only relevant and competent evidence to go to the jury and if this instruction had been given it could have had no other effect than to mislead the jury into believing that some of the matters before it might be properly disregarded. It is true that the trial judge could have readily modified the instruction to state the law correctly, but it has been repeatedly held that the court is under no legal duty to do so. We are of the opinion that the instruction was properly refused.

By its verdict the jury found the defendant guilty. The law has committed to the jury the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting, this court will not substitute its judgment for that of the jury. (People v. Francis, 302 Ill. 247.)

For the reasons stated herein the judgment of the Circuit court is affirmed.

Affirmed.

Scanlan, P. J., and Friend, J., concur.

jury might misconstrue them and still stay in line. The instructions did not state what questions the jury was bound to consider in each case, nor what might disregard. It is fair to assume that the trial court permitted only relevant and competent evidence to go to the jury and if this instructions had been given in which the trial court stated that to mislead the jury into believing that some of the matters herein it might be properly disregarded. It is here that the trial judge could have readily modified the instructions to state the law correctly, but it has been repeatedly held that the court is under no legal duty to do so. To use of the words that the instructions was properly refused.

By its verdict the jury found the defendant guilty. The law has committed to the jury the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is mere conflicting, this court will not substitute the judgment for that of the jury. Hardin v. Thornton, 243 Ill. 307.

For the reasons stated herein the judgment of the Circuit Court is affirmed.

Affirmed.

Trudle, P. J., and Friend, J., concur.

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38338

PETER SMITH,
Appellee,

v.

COUNTY OF COOK,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

283 I.A. 646

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant is from a judgment for $4,500 in favor of plaintiff which was entered by the trial court upon the verdict of a jury in an action of trespass brought by Peter Smith, against County of Cook, February 3, 1926.

Plaintiff's declaration alleged, substantially, that for five years next preceding the commencement of this suit, he owned and was possessed of certain land described therein and was entitled to the undisturbed occupancy of same; that his property was improved with a certain dwelling, garage and chicken house, which said dwelling was occupied by plaintiff and his family, consisting of his wife and three children; that a portion of said property was garden land, cultivated and used for growing crops thereon; that the County of Cook maintained a public institution known as the Oak Forest Infirmary upon a large block of neighboring land west of his premises, where it had erected necessary buildings and accommodations for 6,000 patients and their attendants; that for all of the aforesaid five years defendant allowed the noxious, stinking and poisonous sewage in great volume from the buildings and grounds of said institution to flow upon and over the land of plaintiff; that in so doing defendant

[illegible]

[illegible] Appellant,

v.

[illegible] of [illegible],

Respondents.

[illegible] Appeal from [illegible]

[illegible]

No. [illegible] [illegible] The opinion of the court.

This appeal by defendant is from a judgment for plaintiff in favor of plaintiff which was entered by the trial court upon the verdict of a jury in an action of trespass brought by plaintiff against defendant jointly on June, February 1, 1924.

Plaintiff's declaration alleged, substantially, that the time plaintiff was planting the commencement of this suit, he owned and was possessed of certain land described therein and was entitled to the undisturbed occupancy of same; that his property was improved with a certain dwelling, garage and outhouse thereon, which said dwelling was occupied by plaintiff and his family, consisting of his wife and minor children; that a portion of said property was public land, reclaimed and used for grazing purposes; that the owner of land maintained a public in-stitution known as the Oak Grove Infirmary upon a large block of neighboring land west of his premises, which is but erected necessary buildings and accommodations for aged persons and their attendants; that for all of the aforesaid fifty years defendant allowed his machines, vehicles and paraphernalia engaged in great volume from the initiation and growth of said institution to flow upon and over the land of plaintiff; that in so doing defendant

"has trespassed upon plaintiff's premises, appropriated and damaged same for a public purpose, without the consent of plaintiff, and without paying any compensation therefor, and contrary to the rights of plaintiff in the premises guaranteed by the Constitution of the State of Illinois, which provides that his property should not be taken or damaged for public purposes without just compensation;" that "by means of such disposition of sewage" upon his premises by defendant, they became wholly unfit for residence purposes, and plaintiff and his family were greatly inconvenienced and rendered sick by the stenches from such sewage and the appearance thereof; and that said land became poisoned by such sewage and unfit for garden purposes.

After its demurrer to the declaration had been overruled defendant filed a plea of the general issue and two special pleas, upon which reliance is placed only upon the following:

"And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that the mesne grantees of the plaintiff heretofore impleaded it, the defendant, in the Circuit Court of the said County of Cook, to the April term of said court, in the year 1915, in a certain plea of trespass on the case on promises, to the damage of the said mesne grantees of the plaintiff of $10,000, for taking and using the very same land in the declaration mentioned; and such proceedings were thereupon had in that plea, that afterwards, on April 10, 1920, by the consideration and judgment of the same court, said mesne grantees of the plaintiff recovered against the defendant the sum of $12,500 damages, as well as the costs of the said mesne plaintiff in that behalf, whereof the defendant was convicted, as by the record thereof still remaining in the same court more fully appears; which said judgment still remains in full force. And this defendant is ready to verify by said record: Wherefore it prays judgment if the plaintiff ought to have his aforesaid action, etc."

The evidence is undisputed that sewage from defendant's infirmary overflowed a large portion of plaintiff's land, destroying growing crops and trees thereon, killing several thousand of his chickens, polluting his well and causing him to become ill and unable to work or care for his farm.

Upon the trial of this cause defendant offered to prove by the pleadings in a prior action by one Fred Helm against the County of Cook that in the year 1915 Helm, a former owner of plaintiff's land, filed case No. B-8936 in the Circuit court of Cook County, which was an action of trespass on the case for taking, using and damaging his land, which included the land involved in this proceeding and described in plaintiff's declaration; and defendant further offered to show by the judgment entered in that cause that Helm recovered $12,500 from the County of Cook as damages for the permanent injury and damage to his lands caused by defendant's appropriation of same along with its filling system for the conduct and disposition of the sewage from the infirmary. This evidence was offered in support of defendant's special plea heretofore set forth, which alleged one of its defenses to plaintiff's claim, and which it had a right to prove and rely upon at the trial. It was material and competent evidence, and the refusal of the court to admit it, in our opinion, was reversible error.

In the recent case of Helm v. County of Cook, 283 Ill. App. 190 (advance sheets), where the pleadings and judgment for $12,500 in the prior action of Helm v. County of Cook, 213 Ill. App. 1, were admitted in evidence, and it was shown that the land involved in the latter action was included in the land described in the declaration in the former action, and where the facts were practically identical with the facts here, the plaintiff there being the mesne grantor of the plaintiff here, we relied upon the following authorities, Roe v. County of Cook, 308 Ill. 568, Illinois Power & Light Corp. v. Talbott, 321 id. 538, C. & N. I. R. R. Co. v. Loeb, 118 id. 212, Miller v. Sanitary District, 242 id. 321, and Helm v. County of Cook, 213 Ill. App. 1, and held at p. 198:

"The county's liability for damaging private property for public use exists only under the constitution and there can be only

Upon the trial of this cause defendant offered to prove by the plaintiffs in a prior action by one Ted Yoh against the family of Cook that in the year 1919 John, a former owner of plaintiff's land, filed case No. B-8869 in the Juneau Court of Cook County, which was an action of trespass on the case for cutting, taking and damaging his land, which included the land involved in this proceeding and described in plaintiff's declaration; and defendant further offered to show by the judgment entered in that case that John recovered $13,000 from the family of Cook as damages for the permanent injury and damage to his lands caused by defendant's appropriation of water along with his fishing system for the conduct and disposition of the sewage from the industry. While evidence was offered in support of defendant's special plea hereinbefore set forth, which clearly goes to the defense of plaintiff's claim, and which it had a right to prove and rely upon at the trial, it was meritorious and competent evidence, and the record of the court he admits it, in our opinion, was reversible error.

In the present case of Yoh v. County of Cook, 348 Ill. App. 2d (Abstract opinion), where the plaintiffs had judgment for $15,000, in the prior action of Yoh v. County of Cook, 348 Ill. App. 1, were admitted in evidence, and it was shown that the land involved in the latter action was included in the land described in the declaration in the former action, and where the facts were practically identical with the facts here, the plaintiff there being the same grantee of the plaintiff here, we relied upon the following authorities, Yoh v. County of Cook, 348 Ill. App. 2d, Illinois Power & Light Corp. v. Pulsifer, 301 Ill. 396, 3. R. R. Co. v. Ill. v. Dunn, 111 Ill. 512, Miller v. Chicago Elevator, 241 Ill. 310, and Moore v. County of Cook, 212 Ill. App. 1, and Rule 41 R. 1964

"The county's liability for damaging private property for public use exists only under the condemnation and there can be only

one recovery as has been shown. Since plaintiff has already recovered in his former action for the appropriation of the land involved in the instant case for the conduct of the sewage from the infirmary across and through it, he is barred from another recovery for the continued use of the land for the same purpose.

"In the former suit plaintiff's declaration treated the nuisance as permanent and both parties to the proceeding, as well as this court in its opinion in that case, considered the county's conduct and action in causing the sewage to flow over and through plaintiff's land as a quasi-condemnation or permanent taking and appropriation of such an interest in his land as gave defendant the right to continue to use it as an outlet for its sewage, following the natural drainage of the land and as a matter of public necessity. Plaintiff received $12,500 for the use of his premises for this purpose by the county, and, in our opinion, is precluded under the law from recovering any further damage in this regard."

Plaintiff predicates and must predicate the county's liability for the damages he seeks to recover solely on the constitutional provision that "private property shall not be taken or damaged for public use without just compensation" (sec. 13, art. 2, Constitution of the State of Illinois), which contemplates only one recovery for past, present and future damages.

It might be urged that this case may be distinguished from the recent Holm case in that Holm was the person who secured the judgment in the prior case for the permanent injury and damage to his land. We fail to see what difference that could make. Holm's recovery in the earlier case encompassed past, present and future damages to the land because of its permanent injury, and when the ownership of that portion of Holm's land described in the declaration in this cause became vested in plaintiff through mesne conveyance, it was impressed with the county's "right to continue to flow the surface of these premises without making further compensation." (Miller v. Sanitary District, supra.)

Plaintiff claims that when he purchased the property he was unaware of the menace of the sewage from the infirmary and that therefore he has a right to recover. Holm brought the original action against the county in 1910 for permanent damage

to the land involved here, as well as to other land belonging to him, because of the overflow of the infirmary sewage, and on April 10, 1920, recovered the judgment against Cook County for $12,500 for such permanent damage. It does not appear on just what date in 1920 plaintiff purchased the property, but whether he purchased it before or after the date of the judgment, he is chargeable under the law with notice of the filing of Holm's suit in 1915 for permanent damage to the land by reason of the overflow of the sewage. This being so it is fair to assume that he purchased the property as it was with its surroundings, and with the disadvantage of the likelihood of the continued overflow of the infirmary's sewage onto his land. It must be assumed that the menace of the open sewage decreased the market value of this and other property affected by it and it is to be taken that plaintiff paid but its decreased value for the property, so that, in effect, he has been allowed the damages resulting necessarily from the proximity and overflow of the sewage in the reduced price, which, on that account, he must have paid for the property. As the former owner sued and recovered for the depreciation in the value of the property caused by the overflow of the sewage, there is no right of recovery in plaintiff, his mesne grantee. (C. & N. I. R. R. Co. v. Loeb, supra.) In the Loeb case, the court said: "If there might be successive recoveries from time to time of the constantly recurring damages, then, as was said in the Grabill case, 'a similar recovery might be had at every term of the court, and in this shape the plaintiff might recover ten-fold the value of the property.'" The principle that the Constitution contemplates only one recovery for the taking or damaging of private property for public use is just as applicable whether the property remains in the same hands or passes through many hands.

In view of the fact that we think that the judgment for $12,500 recovered against defendant by Holm, the means grantor of plaintiff in the action brought by him in 1915, is a complete bar to recovery here, we deem it unnecessary to unduly lengthen this opinion by discussing the other points urged.

The reasoning and conclusions reached by us in Holm v. County of Cook, 283 Ill. App. 190, are controlling in this case. Because of the trial court's improper refusal to admit into evidence the pleadings in the former action and the judgment recovered therein by Holm for permanent damage to the land involved, and because plaintiff has not conceded either in the record or in his brief that there was such a former action and judgment, we are obliged to reverse the judgment and remand this cause. If it is tried again, it will be the duty of the trial court to permit the introduction into evidence of the pleadings in such former actions and the judgment therein, as well as any other matters pertinent thereto.

For the reasons stated herein the judgment of the circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

GEN. NO. 8935 AGENDA NO. 17

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1935.

KOSTANTY JACKOWICZ, Appellee, vs. KEWANEE PUBLIC SERVICE COMPANY, Appellant.	APPEAL FROM THE CITY COURT OF THE CITY OF KEWANEE.

DOVE, J.

This suit was instituted by Kostanty Jackowicz against Kewanee Public Service Company, William Dralla, Sam M. Cox and the Illinois Power and Light Corporation to recover the price paid for twenty-five shares of six per cent cumulative perferred stock of the Illinois Power and Light Corporation. After the issues had been made up, a trial was had and at the conclusion of all the evidence, the court granted the motion for a peremptory instruction as to the defendants, Dralla, Cox and the Illinois Power and Light Corporation, but denied it as to the Kewanee Public Service Company. Thereafter, by leave of court, additional counts to the complaint were filed, to which the remaining defendant, Kewanee Public Service Company, filed an answer and after plaintiff had filed a reply, the cause was submitted to a jury, resulting in a verdict in favor of the plaintiff

for $2592.50, upon which judgment was rendered and the record is here for review by appeal.

The additional counts alleged that appellant, Kewanee Public Service Company was a corporation engaged in selling securities and had for sale certain preferred capital stock of the Illinois Power and Light Corporation, that on May 21, 1930 appellant sold to the plaintiff twenty-five shares of such stock for $2500.00 upon the oral agreement that whenever so requested, appellant would return to appellee the purchase price upon the return of the stock, that in September, 1933, appellee offered to return the stock and requested the return of the pruchase price which appellant refused to do. The verified answer of appellant denied that it was engaged in selling securities, denied that it ever had for sale any preferred stock of the Illinois Power and Light Corporation or ever sold any of such stock to appellee. By its answer appellant denied that appellee paid appellant $2500.00 but averred that said sum was paid to Power and Light Securities Company. Appellant by its answer also denied the making of the oral agreement to repurchase the stock as alleged, and averred that no person was everyauthorized to make or enter into any such agreement with appellee. To this answer appellee filed a reply and traversed the averment that the $2500.00 was paid to Power and Light Securities Company, reiterating that it was paid by appellee to appellant anddenying that no person was ever authorized by appellant to make the oral repurchase agreement.

The evidence discloses that appellant is and has been for a number of years a public utility serving the City of Kewanee and its inhabitants with light, power, gas and transportation. That in May, 1930, and for several years prior thereto, William Dralla was one of its employees and superintendent of its gas distribution department.

the [illegible], upon which judgment was rendered and the record is now for review by appeal.

The additional counts alleged that Franklin Public Service Company was a corporation engaged in utility business and had for sale certain preferred capital stock of the Illinois Power and Light Corporation, that on May 21, 1929 appellant sold to the plaintiff twenty-five shares of such stock for $[illegible].00 upon the oral agreement that whenever so requested, appellant would return to appellee the purchase price upon the return of the stock, that in September, 1929, appellee offered to return the stock and requested the return of the purchase price which appellant refused to do. The verified answer of appellant denied that it was engaged in selling securities, denied that it ever had for sale any preferred stock of the Illinois Power and Light Corporation or ever sold any of such stock to appellee. By its answer appellant denied that appellee paid appellant $[illegible].00 and averred that such sum was paid to Power and Light Securities Company. Upon joinder by the answer also denied the making of the oral agreement to repurchase the stock as alleged, and averred that to make the aforementioned to make or enter into any such agreement with appellee. To this answer appellee filed a reply and traversed the averment that the $[illegible].00 was paid to Power and Light Securities Company, reiterating that it was paid by appellee to appellant considering that he intent was ever authorized by appellant to make the oral repurchase agreement.

The evidence discloses that appellant is and has been for a number of years a public utility serving the City of Danville and its inhabitants with light, power, gas and transportation. That in July, 1929, and for several years prior thereto, William Smith was one of its employees and superintendent of its gas distribution department.

That appellant did not own any shares of the capital stock of the Illinois Power and Light Corporation, but the Power and Light Securities Company did. That Dralla, along with other employees of appellant, was offered a commission by the Power and Light Securities Company of $1.50 per share for selling stock in the Illinois Power and Light Corporation. Appellant placed at the disposal of Dralla and others copies of a prospectus which described the stock of the Illinois Power and Light Company and appellant also advertised that it had an investment department and investors were requested to consult its investment representatives with reference to purchasing stock in the Power and Light Corporation, and all these advertisements extolled the merits of the preferred stock of this Power and Light Corporation. On May 10, 1930, appellee, at appellant's place of business in Kewanee, paid Dralla $2500.00 and received from him a receipt stating that it was in full payment of twenty-five shares of the preferred stock of the Illinois Power and Light Corporation. An order requesting the reservation of twenty-five shares of the preferred stock of that company was prepared by Dralla and signed by him as representative of the Securities Company. According to Dralla's testimony, a copy thereof was delivered to and accepted by appellee, but appellee denies that such duplicate was tendered to him by Dralla or ever received by him, and he produced upon the trial the receipt which he did receive, which does not contain the name of the Power and Light Securities Company. Thereafter appellee received the stock certificate which was dated May 21, 1930. He accepted the same, collected dividends thereon as long as appellant paid dividends, but in December, 1933 tendered to appellant this certificate of stock and demanded from it the return of the money which he paid for its purchase. The evidence as to

what Dralla said at the time he received the $2500.00 from appellee and prior thereto is conflicting. On behalf of appellee, the evidence tended to prove that Dralla said that appellant was selling this stock, that the stock was good, and the the company would pay six per cent quarterly, that the stock was under state supervision and therefore it had to pay dividends, that it was not possible for appellee to lose any money because any time he wanted his money back, all he had to do was to come to appellant's office, bring the stock with him and he would be repaid by appellant the amount he was paying therefor and would be able to get from appellant the amount of money he paid therefor within seventy-two hours thereafter. On behalf of appellant Dralla testified and denied that he ever made any such statements, his testimony being to the effect that appellee and his sons stated to him that they would buy the stock if he, Dralla, thought it was a safe investment, that he thought it was and said so, that he also told appellee that if he wanted to dispose of it that it could be resold. The evidence further discloses that the market value of the stock at the time it was sold was $100.00 per share and for approximately two years thereafter the stock had that value. All the direct evidence is to the effect that Dralla was not employed by appellant to sell this stock, but when he sold it he did so while acting for the Power and Light Securities Company, which agreed to pay him for his services in making the sale a commission of $1.50 per share and that this amount was subsequently paid by the Power and Light Securities Company to Dralla.

After the evidence was concluded and after a verdict was directed for the defendants other than appellant, and after the two additional counts to the complaint were filed, appellant made a motion for a continuance on account of the absence of material witnesses.

what Dralla said at the time he received the $2500.00 from appellee and prior thereto is conflicting. On behalf of appellee, the evidence tended to prove that Dralla said that appellant was selling this stock, that the stock was good, and the the company would pay six per cent quarterly, that the stock was under state supervision and therefore it had to pay dividends, that it was not possible for appellee to lose any money because any time he wanted his money back, all he had to do was to come to appellant's office, bring the stock with him and he would be repaid by appellant the amount he was paying therefor and would be able to get from appellant the amount of money he paid therefor within seventy-two hours thereafter. On behalf of appellant Dralla testified and denied that he ever made any such statements, his testimony being to the effect that appellee and his sons stated to him that they would buy the stock if he, Dralla, thought it was a safe investment, that he thought it was and said so, that he also told appellee that if he wanted to dispose of it that it could be resold. The evidence further discloses that the market value of the stock at the time it was sold was $100.00 per share and for approximately two years thereafter the stock had that value. All the direct evidence is to the effect that Dralla was not employed by appellant to sell this stock, but when he sold it he did so while acting for the Power and Light Securities Company, which agreed to pay him for his services in making the sale a commission of $1.50 per share and that this amount was subsequently paid by the Power and Light Securities Company to Dralla.

After the evidence was concluded and after a verdict was directed for the defendants other than appellant, and after the two additional counts to the complaint were filed, appellant made a motion for a continuance on account of the absence of material witnesses.

that Smalls said at the time he received the $2510.00 for supplies and prior thereto in controlling. On behalf of appellee, the evidence tended to prove that Smalls said that appellant was selling this stock, that the stock was good, and the company would pay dividends quarterly, that the stock was under state supervision and therefore it had to pay dividends, that it was not possible for appellee to lose any money because any time he wanted his money back all he had to do was to come to appellant's office, bring the stock with him and he would be repaid by appellant the amount he was paying therefor and would be able to get from appellant the amount of money he said therefor within seventy-two hours thereafter. On behalf of appellant Smalls testified and denied that he ever made any such statements, his testimony being to the effect that appellee and his wife stated to him that they would buy the stock if he, Smalls, thought it was a safe investment, that he thought it was and said so, that he also told appellee that if he wanted to dispose of it that it would be resold. The evidence further discloses that the market value of the stock at the time it was sold was $20.00 per share and for approximately two years thereafter the stock had that value. All the direct evidence is to the effect that Smalls was not employed by appellant to sell this stock, but when he sold it he did so while acting for the Power and Light Securities Company, which agreed to pay him for his services in making the sale a commission of $1.50 per share and that this amount was subsequently paid by the Power and Light Securities Company to Smalls.

After the evidence was concluded and after a verdict was directed for the defendants other than appellant, and after the additional counts to the complaint were filed, no effort made a motion for a continuance on account of the absence of material witnesses.

This motion was supported by an affidavit. It appeared from the affidavit filed in support of this motion for a continuance that C. F. De Witt was the secretary of appellant and that if present, he would testify that neither the by-laws provided nor was there any resolution or motion ever adopted by the Board of Directors of appellant, authorizing Dralla or any other person to enter into any agreement with appellee or anyone else whereby appellant would pay back to appellee or anyone else the amount paid for stock in the Illinois Power and Light Corporation. From this affidavit it also appeared that H. E. Johnson was treasurer of appellant and that if present he would testify that the stock involved in this proceeding was not sold by appellant but by Power and Light Securities Company, that Dralla in effecting the sale was acting as agent of that company and not acting for or representing appellant, that appellant at the time of the sale did not own or have for sale any stock of the Illinois Power and Light Corporation and did not pay Dralla any commissions for effecting said sale and that appellant received no part of the purchase price which appellee paid Dralla. It also appeared from this affidavit that Forrest P. Williams was the Sales Manager for Power and Light Securities Company and was in no way connected with appellant, that if present said Williams would so testify and would also testify that in effecting the sale of stock to appellee, Dralla was acting as agent of Power Light and Securities Company and not for appellant, and that Dralla nor any one else ever had any power or authority from Power and Light Securites Company to enter into any repurchase agreement with appellee or with any one else. When this motion for a continuance was presented, counsel for appellee stated that appellee would admit that the several witnesses mentioned in the affidavit in support of appellant's motion for a continuance would testify as herein recited, and appellant's motion for a

This motion was supported by an affidavit. It appears from the affidavit filed in support of this motion for a continuance that E. F. Ritt was the secretary of appellant and that he swears, he would testify that neither the by-laws nor any other resolution or motion ever adopted by the board of directors of appellant, authorizing Drake or any other person to enter into any agreement with appellee or anyone else regarding appellee's property, would be in evidence in the Illinois Power and Light Corporation. From this affidavit it also appeared that H. S. Johnson was treasurer of appellant and that he would testify that the stock issued in this proceeding was paid by appellant but by Power and Light Corporation, that Drake in effecting the sale was acting as agent of that corporation and not acting for or representing appellant, that according to the view of the sale did not own or have for sale any stock of the Illinois Power and Light Corporation and did not pay any commissions for effecting such sale and that appellant received no part of the purchase price which appellee paid Drake. It also appeared from this affidavit that Morris F. Williams was an attorney for Power and Light Securities Company and that if he had connected with an offer, that if matters said Williams would testify and would also testify that in effecting the sale of stock to appellee, Drake was acting as agent of Power Light and Securities Company and not for appellant, and that Drake was not and did not had any power or authority from Power and Light Securities Company to enter into any contract or agreement with appellee or anyone else. Upon this motion for a continuance was presented, and for grounds stated that counsel would state that the witness [illegible] in the affidavit in support of appellant's motion [illegible] would testify as herein recited, and counsel's motion for

continuance was thereupon denied and counsel for the respective parties proceeded to argue the cause to the jury.

Under the pleadings, the burden was cast upon appellee to establish by a preponderance of the evidence that Dralla was authorized to enter into an agreement on behalf of appellant to repurchase the stock of the Illinois Power and Light Corporation, which he, Dralla, sold to appellee. Counsel for appellee insists that this requirement has been met and that the evidence discloses that appellant held Dralla out as its agent in such a manner that appellee, acting as an ordinary, prudent man might reasonably draw the conclusion that Dralla had the power to make the contract of repurchase which forms the basis of this suit. It is true that the evidence does disclose that appellant inserted advertisements in the local Kewanee newspaper requesting investors to call at its offices in Kewanee for full information regarding the purchase of preferred stock of the Illinois Power and Light Corporation and to there have explained to them why such stock is a safe investment. These advertisements also stated that appellant, through its investment department, maintains a ready market for its securities, that since 1904 the Illinois Power and Light Corporation and its predecessors have paid dividends uninterruptedly upon their preferred stock and that such stock is exempt from the normal Federal Income Tax. It is also true that the evidence discloses that Sam M. Cox was the manager of appellant and it tends to prove that several years prior to the time appellee bought his stock, Cox stated to employees of appellant who were engaged in selling stock of the Illinois Power and Light Company that such stock was good stock, paid dividends and that the purchasers could get their money back any time they wanted it. We have read with care all the evidence as abstracted

[illegible] was thereupon denied and counsel for the respective parties proceeded to argue the cause to the jury.

Under the pleadings, the burden was cast upon appellee to establish by a preponderance of the evidence that Stella was authorized to enter into an agreement or benefit of appellant to purchase the stock of the Illinois Power and Light Corporation, which he, Stella, sold to appellee. Counsel for appellee insists that this requirement has been met and that the evidence discloses that appellant held Stella out as its agent in such a manner that appellee, acting as a reasonably prudent man would reasonably have the authority that Stella had the power to make the contract of purchase which forms the basis of this suit. It is true that the evidence does disclose that appellant inserted advertisements in the local newspaper requesting investors to call at its offices in Newman for full information regarding the purchase of preferred stock of the Illinois Power and Light Corporation and to these have explained to them why such stock is a safe investment. These advertisements also stated that appellant, through its investment department, maintains a ready market for its securities, that since 1924 the Illinois Power and Light Corporation and its predecessors have paid dividends uninterruptedly upon their preferred stock and that such stock is exempt from the normal Federal Income Tax. It is also true that the evidence discloses that Dan K. Dor was the manager of appellant and it tends to prove that several years prior to the time appellee bought his stock, Dor visited to employees of appellant who were engaged in selling stock of the Illinois Power and Light Company that such stock was good stock, paid dividends and that the stockholders could not lose money that any time they wanted it. We are fully aware of the evidence as characterized

and we can not escape the conclusion that it fails to show that Dralla was authorized by appellant to enter into the repurchase agreement which forms the basis of this proceeding. Appellee may have believed he was purchasing stock from appellant, but he was not. He may have believed that Dralla represented appellant when he made his purchase, but Dralla was not. Appellee may have believed that Dralla was authorized by appellant to enter into an oral repurchase agreement, but Dralla was not. Appellee dealt with Dralla and no one else and whatever the contract may have been, appellee knew it was being made by some one as agent for some one else, and it was incumbent upon him to ascertain the extent of his authority.

In our opinion the trial court erred in not granting appellant's motion ~~at the conclusion of the hearing for a peremptory instruction~~ and for this reason the judgment of the City Court of the City of Kewanee is reversed and the cause remanded.

~~JUDGMENT~~ REVERSED.

and remanded.

for a new trial

and we can not escape the conclusion that it fails to show that Orella was authorized by appellant to enter into the reversionary agreement which forms the basis of this proceeding. Appellant may have believed he was purchasing stock from appellee, yet he was not. He may have believed that Orella represented appellant when he made his purchase, but Orella was not. Appellee may have believed that Orella was authorized by appellant to enter into an oral reversionary agreement, but Orella was not. Appellee dealt with Orella and no one else and whatever the contract may have been, appellee knew it was being made by some one as a agent for some one else, and it was incumbent upon him to ascertain the extent of his authority.

In our opinion the trial court erred in not granting appellant's motion [illegible]

and for this reason the judgment of the City Court of [illegible] is reversed.

Reversed in Part.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

283 I.A. 647

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 49172 Docket No. 42

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT
October Term, A. D. 1933.

In the Matter of the Conservatorship
of John Tomas, an Incompetent Person,

Appellee

vs.

Frank T. Hines, As Administrator of
the Veterans Affairs,

Appellant.

Appeal from Circuit
Court, Will County.

MEMORANDUM - P.J.

On May 4, 1932, the Joliet National Bank was appointed conservator of the estate of John Tomas, by the probate court of Will county. The incompetent was a war veteran and his estate consisted of compensation and war risk insurance. On January 13, 1932, said bankrupended business and was later placed in the hands of a receiver. On October 27, 1932, the receiver of the bank filed a report of the acts and doings of such bankrupt conservator. The successor conservator filed objections to this report. Three items of the report were objected to, which represented investments by the appellee conservator as follows: Mortgage notes of Michael S. and Alice Popovich in the sum of $4000; mortgage notes of Ar. Mary's Assumption Greek Catholic Church in the sum of $2000; and First mortgage bond of the Lewis Junior College in the sum of $1000. The probate court sustained objections to the Popovich notes and to the Lewis Junior College bond. It overruled objections to the notes of St. Mary's Greek Catholic Church. The successor conservator appealed from the order of the probate court to the circuit court of Will county. There, he was permitted to amend the objections filed by adding a prayer that the securities objected to be turned over

to the successor conservator and he permitted to hold same until the cash had been substituted in full therefor, in the total sum of $13,000, which was the face value of such securities. The circuit court sustained objections as to all of the above investments. Appellee concedes that the investments were not proper and the objections thereto rightfully sustained. The court decreed that Victor Tomac as the successor conservator, was entitled to a claim against the bank for $1365.65, the cash balance belonging to the estate at the time of the suspension of the bank; that he was also entitled to a claim for $13,000, being the principal amount of the securities to which objections had been sustained. The court denied the prayer for an order requiring the appellee to deliver and turn over the securities to the successor conservator to be held by him until he had received payment therefor in cash. The successor conservator prosecutes this appeal from the judgment and decree of the circuit court.

It is first contended by appellant that the court erred in not permitting the successor conservator to take the securities wrongfully purchased and to hold same until such time as appellee should pay to him $13,000. Because of errors urged by appellant hereafter discussed, we do not deem it necessary in the disposition of this case to pass upon the above ruling of the trial court. However, the cases of Supreme Lodge of K.P. v. Hinsey, 241 Ill. 384, 390, and Glezos v. id. 346 Ill. 96, 99, are deemed pertinent upon this question. The second point assigned as error for reversal is the same as the first.

The third assignment is based upon the failure of the court to state or cause to be stated a final account upon the report as filed by appellee conservator. The fourth assignment of error is directed toward the lack of jurisdiction in the probate court and in the circuit court, as a court of appeal, to adjudicate a claim against a national bank as was done in this proceeding and at the same time making such judgment or adjudication subject to the

to the successor conservator and be permitted to hold same until the cash had been substituted in full therefor, in the total sum of $13,000, which was the face value of such securities. The circuit court sustained objections as to all of the above investments. Appellee concedes that the investments were not proper and the objections thereto rightfully sustained. The court decreed that Victor Tomes as the successor conservator, was entitled to a claim against the bank for $1882.88, the cash balance belonging to the estate at the time of the suspension of the bank; that he was also entitled to a claim for $13,000, being the principal amount of the securities to which objections had been sustained. The court denied the prayer for an order requiring the appellee to deliver and turn over the securities to the successor conservator to be held by him until he had received payment therefor in cash. The successor conservator prosecutes this appeal from the judgment and decree of the circuit court.

It is first contended by appellant that the court erred in not permitting the successor conservator to take the securities wrongfully purchased and to hold same until such time as appellee should pay to him $13,000. Because of errors urged by appellant hereafter discussed, we do not deem it necessary in the disposition of this case to pass upon the above ruling of the trial court. However, the cases of Jayne's Lodge of I. O. v. Massey, 241 Ill. 324, 330, and Gibson v. Id. 246 Ill. 98, 99, are deemed pertinent upon this question. The second point assigned as error for reversal is the same as the first.

The third assignment is based upon the failure of the court to state or cause to be stated a final account upon the report as filed by appellee conservator. The fourth assignment of error is directed toward the lack of jurisdiction in the probate court and in the circuit court, as a court of chancery, to adjudicate a claim against a national bank as was done in this proceeding and at the same time making such judgment or adjudication subject to the

discretion and non-judicial functions of the office of the Comptroller of the Currency. The fifth assignment is quite similar to the fourth and is directed toward the adjudication of a claim against a national bank in receivership, as was done herein, and making the same subject to the Comptroller of the Currency, with power to determine the priority or preference for the payment thereof.

The sixth assignment is directed toward the failure of the court to find that the appellee conservator did not assume to guarantee the investment, and the seventh is directed toward the allowance of two items for attorney fees of $25.00 each, and one item of $50.00 for fees to the receiver of the bank. No objections were made to any of these fees either in the county or circuit court. Therefore the same will not be considered here. Neither do we deem it necessary to consider the sixth assignment.

Probate courts have original jurisdiction in the appointment of conservators and the settlement of their accounts, Ch. 37, Ill. Statutes, Probate Court, Para. 5. From the record before us, we are of the opinion, it is the desire of the appellant that the probate court should have ordered the appellee conservator to restate his account and charge himself with cash in lieu of the securities to which objections were sustained. Ordinarily a conservator is not deemed to be in default until he has first been ordered to account and is unable to produce the money. People v. Birket, 342 Ill. 333, 338. However, there is evidence here that the conservator was insolvent prior to the filing of the report, and was still insolvent at the time of the hearing thereon. The probate court entered its order with reference to the securities to which objections were sustained, in a similar manner to that of the circuit court, as to decreeing that the same should be a claim against the receiver of an insolvent national bank. It appears from the contentions of appellant that he desired the probate court to exercise its statutory rights and powers as provided by the

discretion and non-judicial functions of the office of the Comptroller of the Currency. The fifth assignment is quite similar to the fourth and is directed toward the adjudication of a claim against a national bank in receivership, as is done herein, and making the same subject to the Comptroller of the Currency, with power to fulfill the liability in preference for the primary interest.

The sixth assignment is directed toward the failure of the court to find that the appellee conservator did not assume to exercise the jurisdiction, and the matter is directly raised by allowance of two items for attorney fees of $5.00 each, and one item of $30.00 for fees to the receiver of the bank. No objections were made to any of these fees either in the county or circuit court. Therefore the same will not be considered here. Neither do we deem it necessary to consider the sixth assignment.

Probate courts have original jurisdiction in the accountment of conservators and the settlement of their accounts, Ch. 37, Ill. Statutes, Probate Court, Para. 5. From the record before us, we are of the opinion, it is the desire of the appellant that the probate court should have ordered the appellee conservator to restate his account and charge himself with cash in lieu of the securities to which objections were sustained. Ordinarily a conservator is not deemed to be in default until he has first been ordered to account and is unable to produce the money. Coyle v. Birkel, 342 Ill. 338, 339. However, there is evidence that the conservator was insolvent prior to the filing of the report, and was still insolvent at the time of the hearing thereon. The probate court entered its order with reference to the securities to which objections were sustained, in a similar manner to that of the circuit court, is to decreeing that the case should be a claim against the receiver of an insolvent national bank. It appears from the contentions of counsel that he desired the probate court to exercise its statutory rights and powers as provided by the

several sections of Ch. 86 of the Statute. It will be found that section 4 of said chapter has to do with proceeding against the security of any such conservator; section 10, with the manner of accounting and of enforcing such accounting; section 32, with the removal of sonservator; section 34, with the resignation thereof, and section 35, with the delivery of the property of the estate to a successor conservator. As we understand this case, the hearing arose solely upon objections filed to certain items of appellee conservator's report. Where a conservator files a final report upon his resignation or removal, and objections filed and sustained thereto, the retiring conservator should be ordered to restate his report to conform with the order of the court and to deliver over to his successor the property of the estate found to be due from him. The successor conservator may maintain an action for any property not so accounted for. Jones and Cunningham Probate Practice, (4th ed.), p. 560; Richardson v. People, 85 Ill. 495. Horner Probate Practice p. 869.

We do not understand that appellant was seeking to prosecute any claim against the insolvent bank or the receiver thereof, in this proceeding. It appears that the only matter in controversy and the only matter for determination was whether the items complained of should be approved or disapproved by the court. In case of disapproval, the appellee conservator should have been ordered to restate his account and charge himself with the money represented by such rejected items. Whatever action or proceedings the successor conservator might elect to take to recover for any goods, chattels, moneys, title papers or other effects belonging to the ward, which were in his custody, and which he failed to deliver to appellant conservator, would rest with such successor conservator. Horner Probate Practice, p. 868. From what can be gained from the brief of appellant, this seems to be his contention in this case. The right of a successor conservator

[illegible] sections of Ch. 23 of the Statutes. It will be found that section 4 of said chapter has to do with preserving market the security of any such conservator; section 10, with the manner of assuming and of enforcing such duty; section 22, with the removal of conservator; section 24, with the resignation thereof, and section 26, with the delivery of the property of the estate to a successor conservator. As we understand this case, the hearing arose solely upon objections filed to certain items of appellee conservator's report. Upon a preliminary trial [illegible] and objections filed and sustained thereto, the returning conservator should be ordered to restate his report to conform with the order of the court and to deliver over to his successor the property of the estate found to be due from him. The successor conservator may maintain an action for any property not so accounted for. [illegible] ed.), p. 380; Richardson v. Toople, 28 Ill. 488. Horner Probate Practice p. 388.

We do not understand that appellant's seeking to restate any claim against the insolvent bank or the receiver thereof, in this proceeding. It appears that the only matter in controversy and the only matter for determination was whether the items complained of should be approved or disapproved by the court. In case of disapproval, the appellee conservator should have been ordered to restate his account and charge himself with the sums represented by such rejected items. Whether appellee or proceeding the successor conservator might elect to take in reserve for any goods, chattels, money, bills, papers or other effects belonging to the ward, which were in his custody, and which he failed to deliver to appellant conservator, would rest with such successor conservator. Horner Probate Practice, p. 388. From what can be gained from the brief of appellee, this seems to be his contention in this case. The right of a successor conservator

to proceed against a former conservator to recover property of the ward, need in no way interfere with the statutory power of the court to compell a proper accounting and settlement.

The liquidation of national banks is not within the jurisdiction of state courts as is the liquidation of state banks. Claims against national banks are to be filed with the receiver, who in turn presents them to the Comptroller of the Currency, who either allows or rejects them. If the Comptroller allows the claim as filed, the creditor becomes entitled to participate in the funds to be distributed. If the Comptroller declines to recognize the claim, it must then be established by the adjudication of some competent court. People ex rel Nelson v. Farmers and Merchants Bank, 281 Ill. App. 354, 363.

The judgment and decree of the circuit court sustaining objections to the three items with respect to the mortgage notes of Michael M. and Anna Papesh in the sum of $4000, mortgage notes of St. Mary's Assumption Greek Catholic Church in the sum of $8000, and mortgage bond of the Louis Joliet Garage in the sum of $1000, is affirmed. In all other respects the judgment and decree of the circuit court is reversed; the judgment and decree of the probate court is reversed; and this cause is remanded to the probate court of Will county with directions that said court shall by its order direct appellee conservator to recast his report and restate his account therein, charging himself with the principal sum of $13,000, representing the total funds invested in the above securities; and for further proceedings in conformity hereto.

Affirmed in part, reversed in part, and
remanded with directions.

be proved against a former conservator to recover property of the ward, used in no way interfere with the statutory power of the court to compell a proper accounting and settlement.

The liquidation of national banks is not within the jurisdiction of state courts as is the liquidation of state banks. Claims against national banks are to be filed with the receiver, who in turn presents them to the Comptroller of the Currency, who either allows or rejects them. If the Comptroller allows the claim as filed, the creditor becomes entitled to participate in the funds to be distributed. If the Comptroller declines to recognize the claim, it must then be established by the adjudication of some competent court. People ex rel Heinrich v. Farmers and Merchants Bank, 281 Ill. App. 322, 326.

The judgment and decree of the circuit court overruling objections to the three items with respect to the mortgage notes of Michael K. and Anna Pagel in the sum of $4000, mortgage notes of St. Mary's Lawnridge Greek Orthodox Church in the sum of $4000, and mortgage bond of the Louis Joliet Service in the sum of $1000, is affirmed. In all other respects the judgment and decree of the circuit court is reversed; the judgment and decree of the probate court is reversed; and this cause is remanded to the probate court of Will county with directions that said court shall by its order direct appellee conservator to recast his report and restate his account therein, charging himself with the principal sum of $13,000, representing the total funds involved in the above proceedings and for further proceedings in conformity herewith.

AFFIRMED in part, reversed in part, and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 8997 Agenda No. 48

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935

Theodore Van Neuning,

Appellant,

vs.

L. O. Eagleton, et al,

Appellees,

Appeal from the Circuit Court of Peoria County

HUFFMAN- P. J.

This is an action for accounting brought by appellant against appellees growing out of certain legal services performed by Mr. L. O. Eagleton, as attorney for appellant, wherein it is alleged that wrongful charges for professional services were made against appellant through the exercise of undue influence and abuse of fiduciary relationship existing between the parties, as attorney and client.

Appellant was the owner of certain farm land located near the City of Peoria, which land was encumbered by a mortgage loan of $21,500. This loan was due March 1, 1930. Shortly prior to the maturity date appellant employed L. O. Eagleton an attorney at law and a member of appellee firm, to represent him in an effort to obtain an extension upon the above loan. It was comprised of sixteen notes held by different owners, and had been negotiated through a bank. Appellant had become delinquent in the payment of interest on the loan and the bank had advanced $1969.52 interest to the various note holders. Appellant had executed his note to the bank for this amount. The bank had taken judgment against appellant on the note. Subsequently, and on April 11, 1930 the bank was closed by the Auditor of Public Accounts. Various of the note holders then instituted a foreclosure suit against the land. Mr. Eagleton on behalf of appellant prepared bankruptcy schedules for filing. Said

Leppert, who was a party to the foreclosure suit and who was the holder of a $5000 note, offered to withdraw from the suit and to sell her note for $1500. Appellant was indebted to one Jacob Dringenberg in the sum of $825. Arrangements were made whereby the said Dringenberg bought the above note from Sadie Leppert and it was agreed that the attorney should be entitled to any surplus of money realized from the Leppert note over the sum of $2325, which amount represented the $1500 paid for the note and the $825 due Dringenberg.

The relationship of attorney and client with respect to the matters in controversy in this suit originated shortly prior to March 1, 1930 and continued until the month of June, 1933. As might be expected considerable personal feeling is w manifest in this case. It would serve no good purpose to discuss these matters. Appellees insist that the statement of the case by appellant is "hopelessly confused," while appellant charges in his reply brief that "appellee has given undue importance to minute details, erroneously stated in some instances and circumstances, and erroneously stated in chronological order of time", by means of which attempts it is charged that appellees endeavor to magnify the services performed.

An examination of the record discloses that the attorney, Mr. L. D. Eagleton, gave much time and effort to securing an extension of the mortgage indebtedness which existed against appellant's farm. There is no question in the record but that appellant on March 1, 1930, was hopelessly insolvent and that he had no available means to meet his indebtedness. Appellee attorney continued to act for appellant. In the spring of 1932, the attorney interested certain parties in the purchase of this land for an airport. The evidence is to the effect that at this time the land had a cash market value of from $65 to $75 per acre for farming purposes. Appellee attorney effected a sale of this land for airport purposes for the price of $125 per acre. The land was surveyed and was slightly less than two hundred acres. The purchase price therefor was $24,375. Following

this, the attorney called in the note holders in order that the notes might be paid and the title to the land made clear. At this time the attorney succeeded in securing a discount from the note holders amounting to the sum of $2150, which inured to the benefit of appellant. It is claimed by Mr. Eagleton that it was agreed between himself and appellant that he should have a fee of $1000 for his services as attorney in the above transaction.

It appears that said attorney had performed other services for appellant prior to this time for which he had been paid small sums of money, none of which are material herein. The outcome of the above sale resulted in the indebtedness of appellant being satisfied, which included satisfaction of a chattel mortgage upon his farming machinery, stock and other personal property valued at over $3000. In addition to this, he received approximately $1620 in cash after the payment of attorney fees and expenses.

The law very properly requires that all dealings between an attorney and his client shall be characterized by the utmost fairness and good faith. Such transactions will be scrutinized with great closeness. It is encumbent upon the attorney, under such circumstances, to show that the transaction is fair and equitable; and that he fully and faithfully discharged his duties to his client; and that his client knew and understood what was taking place. Morrison v. Smith, 130 Ill. 304, 316. To the same effect are Durenforth v. Palmer Tire Co., 240 Ill. 25; Ringer v. Ranes, 263 Ill. 11.

We are not impressed with the position of appellant that he was taken advantage of by his attorney. It clearly appears that appellant was not only unable to meet the mortgage upon his land, but that he was otherwise insolvent. His attorney when he effected the extension of the mortgage, enabled the land to later be sold for airport purposes. At the time of securing such extension said attorney also secured a reduction in the interest rate from 5½ per

[illegible] the attorney making in the [illegible] [illegible] [illegible]

cent to 5 per cent, and a discount of the amount then due, of $1182.50. The result of this extension was that some two years later, the attorney negotiated the sale of the land as above set out, for an airport, which was far in excess of its value as farm land. This sale resulted in the release of appellant's personal property from a chattel mortgage as aforesaid; another discount of his mortgage indebtedness of $2150; the receipt of some $1650 in cash; and the payment and discharge of his debts.

We find nothing in the record to sustain appellant's charge against appellee attorney of fraud and wrongful conduct. Such charges should not be made unless there is some substantial evidence to support them. Gatherwood v. Morris, 360 Ill. 473, 482. The trial court dismissed appellant's bill for want of equity, thereby failing to find that the evidence disclosed any bad faith, fraud, dishonesty, or abuse of fiduciary relationship on the part of said attorney.

We are of the opinion the decree of the trial court was correct and the same is hereby affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 8099 Agenda No. 24

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935

Lee William Bowen, by Chloe Bowen, his mother and next friend,

Appellee,

vs.

Stephen Lewis,

Appellant.

Appeal from the Circuit Court of Winnebago County

HUFFMAN- P. J.

This was an action brought against appellant for personal injuries sustained by Lee William Bowen in a collision between a motor cycle driven by plaintiff and an automobile then being operated by defendant, Stephen Lewis. The trial resulted in a verdict in favor of appellee for $5250. Judgment was entered on the verdict, and appellant prosecutes this appeal from such judgment.

The accident occurred on Seminary street in the City of Rockford, on January 12, 1935. This street runs north and south. Appellant had parked his automobile parallel and adjacent to the curb upon the east side of said street. The car was headed north. Appellee was riding a motorcycle in a northerly direction and approaching a place in the street opposite where appellant's car was parked. The street was covered with several inches of snow and ice. The street was paved with brick. The lanes of travel commonly followed by traffic, had worn ruts in the icy surface in both the north and south bound traffic lanes. Appellant was employed as a collector for a store in Rockford. He had been making a call at a residence on the west side of the street. He crossed from the west side of Seminary street to his car parked

upon the east side thereof, entered the car, started the engine and put the car in motion.

The evidence on behalf of appellee is to the effect that appellant's car after moving forward for a distance of about ten feet, was suddenly turned directly west across the street in the path of appellee's motorcycle, at a time and place when appellee was preparing to go around appellant's car and at a time when appellee was unable to avoid the collision. Appellant stated that it was his desire to travel south upon Seminary street and that upon starting his car he extended his left arm from the window to signal that it was his intention to turn his car to the left in order that he might proceed south.

Appellee denies that appellant gave any signal or warning of his intention to turn his car to the left and across the path appellee was travelling. Two disinterested witnesses saw the accident. They both swore that they saw appellant enter his car, start the same, drive it forward a short distance and then suddenly turn it across the street directly in the path of appellee, without any warning and without extending his arm or hand from the car, as claimed. They state that the window at appellant's left was closed and that they could see appellant's left arm and hand and that he did not extend them from the car. The front wheel of appellee's motorcycle collided with the left front part of appellant's car. Appellee sustained a broken knee and a broken hand.

Appellant assigns three errors for reversal. The first of which is to the effect that the evidence showed appellee to be guilty of contributory negligence and that appellant's motion for a directed verdict should have been granted. Upon this question the jury had the advantage of seeing and hearing the witnesses and were in a better position to pass upon their credibility than a court of review. It is the province of the jury to pass upon

and determine disputed questions of fact. We are not of the opinion that it can be said in this case, as a matter of law, that appellee was guilty of contributory negligence. Appellant's second point urged is directed toward the court's instruction to the jury with reference to the statement of the claim of the plaintiff and of the defense interposed by the defendant. After a short statement of the claim of the plaintiff as charged against the defendant, the court followed such statement with the words: "These charges by the plaintiff are denied by the defendant." Appellant complains in that the court did not make a more detailed statement of his defense. A narrative instruction similar to this and concluding with a like statement, was before this court in the case of Montague v. Larson, Gen. No. 8952, in which such contention was decided adversely to that now urged by appellant. The answer of defendant as filed consists of two paragraphs which are as follows:

I

"He denies the allegations in Paragraphs 1, II, III, and IV of the first count of the complaint.

II

He denies the allegations in Paragraphs 1, II, III and IV of the second count of the complaint."

We are not of the opinion that the appellant was in any way prejudiced in the manner in which the court gave the above portion of its narrative instruction.

Appellant's third assignment of error is directed toward the court's refusal to include in its narrative instructions the following: "No person shall drive a vehicle of the first division as described in Section 8 of this Act upon any public highway in this State at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle or motor bicycle of said first division

operated upon any public highway in this state * * * * where the same passes into the residential portion of an incorporated city, town or village, exceeds 20 miles per hour * * * * such rate of speed shall be prima facie evidence that the person operating such motor vehicle or motor bicycle is running it at a rate of speed greater than is reasonable or proper, having regard to the traffic and use of way, or so as to endanger the life and limb or injure the property of any person." Streets and highways are for the use of the public generally, and each person using the same has rights and assumes obligations to others. The appellee in this case assumed the burden of proving that he was in the exercise of that care required by law and that appellant was negligent in failing to observe such care. This was a question to be determined by the jury from all the evidence in the case. The statute embodied in the above instruction is a rule of law and not a rule in the law of evidence. Johnson v. Pendergast, 308 Ill. 285, 285. The above instruction has been repeatedly condemned, because it is inapplicable to any case in which testimony has been offered that the vehicle in question was not being operated at a rate of speed greater than was reasonable and proper having regard to the traffic and the use of the way, etc. These facts must be gained from the evidence. Riddle v. Mansager, 254 Ill. App. 68, 71; Johnson v. Pendergast, supra.

We have carefully examined the instructions as given by the court, and we believe they fully covered the points involved in this case. The jury were repeatedly told that the burden of proof was upon the plaintiff to establish the fact that he was in the exercise of due care for his own safety; that the defendant was guilty of negligence as charged; and that such negligence of the defendant caused the injury to plaintiff. We are of the opinion that the defenses interposed by the appellant were fully and fairly covered by the court's instructions to the jury.

The judgment of the circuit court is therefore affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9009 Agenda No. 42

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

October Term, A. D. 1935.

Hazel Peters,

Appellee,

vs.

Harold Reuter,

Appellant.

Appeal from the Circuit Court, Peoria County.

HUFFMAN- P.J.

This is an action wherein appellee sues appellant for personal injuries sustained by her while riding as a guest in an automobile driven by appellant. The car in which appellee was riding belonged to Mrs. Catherine Reuter, mother of appellant. Appellee at the time was living with Mrs. Reuter. She had lived there for about two years. She is a second cousin to appellant. On August 8, 1931, Mrs. Elsie Sparks, a sister of Mrs. Reuter, and her two daughters, Ethelina, age 14, and Roberta, age 4, were visiting at the home of Mrs. Reuter, in Peoria. It was decided by Mrs. Reuter and her sister Mrs. Sparks, that they would drive to the home of their mother at Wennepin, Illinois, for a few hours visit. Appellee was invited to go along and accepted the invitation. Appellant drove the car. Ethelina Sparks was seated to his right, and Mrs. Reuter was seated to her right. Mrs. Sparks was seated on the left of the rear seat; Roberta Sparks was seated in the center, and appellee seated on the right of the back seat.

At a point about twelve miles from Peoria, a collision occurred between the car being driven by appellant and a car driven by Laura Ferguson, which resulted in the injuries sued for. This case was before this court upon a previous occasion and was reversed and remanded due to the fact that the evidence in the record at that

[illegible]

[illegible]

[illegible]

time did not disclose that the accident was the result of the wilful and wanton misconduct of appellant. Peters v. Reuter, 276 Ill. App. 607 (abs.).

The highway upon which the cars involved herein were traveling, ran in a north and south direction. Appellant's car was travelling north. The car being operated by Laura Ferguson was travelling south. The accident occurred at about 6:00 o'clock in the afternoon. The highway was an ordinary concrete state highway, designated as state highway No. 29, and at the place in question was level and straight and there was nothing to obstruct the view. The road was located along the west bank of a river. A light rain or mist was falling which made the pavement wet. Laura Ferguson was driving a Ford car which she had borrowed for the purpose of this trip. The car belonged to Dewey Wright. She testified that she was operating the car upon the right side of the black line which was located in the center of the pavement. Her account of the accident is very vague and indefinite. She states that she does not remember anything after the accident as she was rendered unconscious. She further states that she was travelling at the rate of approximately thirty miles per hour; that she saw appellant's car coming toward her; that she did not know what model Ford car she was driving; that the road was entirely level and there was nothing to obstruct her view; that she had no recollection of either of the wheels on the right side of her car slipping off the pavement, or of losing control thereof. She says that she doesn't know upon what part of the highway the collision occurred; that the last thing she remembers was that she was on the "right hand side" of the pavement. She does not know the place in the highway where the collision occurred nor the position of her car afterwards. She has a suit pending against appellant for damages growing out of this accident.

Appellee was riding in the back seat of appellant's car and upon the right side thereof. She testified as to their passing various cars upon the highway. It is her contention that appellant was operating his car at such an excessive rate of speed as to constitute wilful

time did not disclose that the original was the result of the mixing and mobile displacement of crystals. (Which is, however, the fact - see Key Lab.).

The lighting was also in some instances beyond mere blending, was in a sense an art itself therefore. Specialists also had investigated myth. The ear which operated by means therefore for instilling moods. The artistic evaluation is what did it's work. In his criticism. The slightly was a military or merely which commence, determined to make lighting the. Or, and it was time to consider the sort and atmosphere and there was actually to understand the work. The song was lengthed along the work land of a river. A light that or not the feeling which made the pressure red. Later because was difficult a that our which one had been used for the chorus of this type. The ear be-longed to lower voices. The beautiful bit was morning the ear upon the right side of the blue line which was lowered to the center of the pressure. The measure of the musical to very weak and indefinite. One stage that was made was somewhat slightly after the artificial as the was created conversations. The instrument stage that was the treatment of the tone of composition of the work. Only that the air brightness and moving towards that this is not the work that work for was the difficulty that it was just the artificial land. Some was making to discover our that was and an representation of either of the music or the light was of the and adding off the harmony, or of light quality. The song was that was an art was that part of the theory the was light particularly that the best using the something that the was on the first land light of the pressure. The that the long is as the alternate measure the middle measure of the instead of the alternate. The has a mid another musical with for measure morning and of this artists.

Lighting was adding in the back ground of instrument and was the light side the red. The beautiful ear in light stage the was were from the bright. It is the artificial bit repeated the counter-the bit ear is such as musical side of piano is a artistic which

and wanton misconduct; that his mother had admonished him to drive slowly; that the pavement was wet and slippery; that appellant's car would skid and swerve on the pavement when he passed cars going in the same direction; and that the accident was the result of the wilful and wanton misconduct of appellant. Prior to and at the time of the accident she was engaged in looking toward the river, which was to her right, and the cottages located along the bank. She was not looking at the highway and did not see the accident. She was rendered unconscious and was therefore unable to give any details regarding the facts existing after the accident.

The testimony of Etheline Sparks is to the effect that appellant's car was being operated upon its proper side of the pavement; that it was travelling straight and not swerving; that she saw the Ford car approaching when it was about two blocks away; that just before the cars reached a point of passing, that the Ford car suddenly slid across the pavement in front of appellant's car; that after the collision, the Ford car was headed east toward the river, crossways of the pavement; that it caught on fire immediately after the accident; that the occupants were removed therefrom; that appellant's car was on the right side of the black line when the collision took place and after the collision had taken place. Mrs. Sparks testified that she noticed nothing unusual about the manner in which appellant operated the automobile; that they passed traffic upon the highway before the accident; that the road where the accident occurred was level and straight; that she saw the Ford car coming and that just before the cars were about to pass, one of the wheels on the right side of the Ford car went off the pavement and that the Ford car then headed directly toward appellant's car in an effort to get back on the pavement, and that when it "got on" the pavement it skidded directly in front of appellant's car; that the collision took place in appellant's traffic lane, which was the side toward the river; that appellant's car was on the right side of the black line before and at the time of the

and works alternately; that is unless the alternative is to
drive slowly into the crowds in the hope of injuring that
specialist's car would not permit of his passing when it
passed onto going in the same direction; and that the accident
was the result of the driver's and only accidental or negligence.
Either he and of the time of the accident was so engaged in trying
his toward the driver, which was in our front, and the motorman
leaned along the track. He was not looking at the driver and
did not see his contact. The was contrary testimony of was
Executive middle to give our opinion regarding the fault which
led after the accident.

The testimony of plaintiff is to the effect that our
specialist's car was being operated upon the wrong side of the road
which but it was crowded through and not specialist trying the
car the road car approaching which it was right the driver among
that just before the car produced a point of contact, that the
road car actually did cross the centerline of plaintiff's
car; that after the collision, the road car was seen and turned
the driver approaches of the crowded; that it appears in this be-
mediately after the accident; that the conductor was inquired
whether that specialist's car was on the wrong side of the line
like the collision; that after the collision he
came plane. Mr. Jordan testified that the national control
about the manner in which specialist operated the automobile; that
they passed traffic when the driver before the accident; that the
road where the accident occurred was level and straight; that the
car the road car moving and that just before the car was about to
pass, one of the wheels on the right side of the road car went off
the pavement and that the road car then backed directly toward
specialist's car in an effort to get back on the pavement, and that
then it "put our" the pavement in attempt directly in front of approach
Lamb's car; that the collision had place i. e. directly, between
lines, which was the side nearer the river; that specialist's car was
on the right side of the street in order a [illegible] the side of the

accident. This witness states that the Ford car "shot over" in front of appellant's car and that there "was a crash." She says the cars were about ready to pass when the Ford car went off the concrete pavement; and that after the accident appellant's car was on the right side of the black line. Mrs. Reuter testified there was nothing unusual about the manner in which appellant was driving the car, and that she did not notice it sliding or skidding on the pavement. She says that when it commenced to rain, she suggested to appellant there was no need to hurry, and that he slowed down the speed of the car. She saw the Ford car prior to the accident; she states that it appeared to her the car skidded off the pavement to the west and then back on the pavement again and directly across the pavement in front of appellant's car; that at the time of the collision, the Ford was crosswise of the pavement with the front end toward the river, on the east side of the pavement. She states that appellant's car was upon the right side of the black line at the time of the collision. Appellant was a witness for appellee as well as for himself. His testimony on behalf of appellee was merely to the fact that there was an accident and appellee was injured. Upon his own behalf he testified that he was driving the car in question; that the road was wet; that he had the windshield wipers working, and that the brakes and mechanical condition of the car were in good repair. He states he passed traffic going in both directions, but that it was not a heavy traffic. He denied there was anything unusual about the movement of the car he was driving or that it swerved or skidded on the pavement. He states that the place of the accident was just at the north end of a sea wall, which was to his right and between the highway and the river; that just north of the sea wall, on the right of the highway, there was a cottage; that the road was straight and level and the vision unobstructed; that he saw the Ford car coming toward him upon its own proper traffic lane; that it was a block or more away when he first fixed his attention upon it; that just before the cars were about to pass, the Ford car dropped off the west edge of the pavement and that upon coming back upon the pavement, immediately skidded across the highway directly into the path of his

car; that he at once applied the brakes on his car; that the front of his car struck the right side of the Ford at about the middle; that the collision occurred almost instantly from the time he first became aware of the situation, and that he had no opportunity to do anything other than set his brakes. He states his car did not skid either before or at the time he applied the brakes; that it was in its proper traffic lane, and remained upon the right side of the black line after the collision. He says the Ford car was headed toward the river after the collision and went off the road, into the cottage upon the east side of the road, caught on fire and burned. The occupants of the Ford car were safely removed. Appellant says that at the time of the accident, he did not see any other car in sight in front of him, and that only the car he was driving and the Ford were near the place of the accident.

An examination of the evidence presented by this record when considered in the most favorable light to appellee, fails to establish wilful or wanton misconduct on the part of appellant. Appellee being injured while in appellant's automobile as a guest, is barred from any recovery against appellant for injuries received because of negligence, and can only recover in the event such injuries are occasioned because of the wilful and wanton misconduct of appellant. Ch. 95½, Sec. 43 (b) Cahill's St. 1933. The charge of wilful and wanton misconduct implies an act intentionally done in disregard of another's rights, designed and intentional mischief, and not a mere negligent omission of duty. Waldren Express Co. v. Krug, 201 Ill. 473, 479. To constitute wilful and wanton misconduct, the party doing the act or failing to act must be conscious of his wrongful conduct, and must be conscious from his knowledge of the surrounding circumstances and existing conditions, that such continued conduct upon his part will naturally and probably result in injury. It is recognized that whether an act is wilful and wanton depends greatly upon the particular circumstances of each case. Bernier v. Illinois Central R. R. Co., 296 Ill. 464, 470.

Appellee insists that since this case has been twice submitted to a jury with the same result in each instance, that under the

pronouncement of this court as made in the case of Hinkle v. Block & Kuhl Co., 259 Ill. App. 674, the judgment upon the second verdict should now be permitted to stand. The rule recognized in the above case is one of long standing, however, it was recognized as being subject to an exception in a case where there is a want of evidence to support the finding. In this respect the court in that case made the following statement: "There was evidence tending to support the declaration and the trial court could not direct a verdict on either trial. Plaintiff was entitled to have her case submitted to a jury unless it could be said, that as a matter of law, the testimony did not fairly tend to prove her cause of action." While the question whether an injury is the result of wilful and wanton misconduct is one of fact, to be determined by a jury from all of the evidence, yet, "Where there is no evidence tending to support the charge of wilful and wanton conduct there is no question of fact to submit to a jury, and the motion to direct a verdict on those counts would present a question of law for the court to decide." Brown v. Illinois Terminal Co. 319 Ill. 528, 530, 531. "A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through restlessness or carelessness when it could have been discovered by the exercise of ordinary care." Brown v. Illinois Terminal Co. supra. p. 531. There is nothing in this record tending to prove that appellant intentionally inflicted the injuries, or that same were received at a time when appellant was exhibiting a reckless disregard for the safety of others, or that after the knowledge of impending danger he failed to exercise ordinary care to prevent the injuries. Neither is there anything in the record tending to prove that the appellant had any knowledge or could have had any knowledge of the danger as it existed in this case, until the Ford automobile skidded across the pavement in the path of his car at a time when he was powerless to avoid the collision.

There is no evidence in the record tending to prove wilful and wanton misconduct upon the part of appellant. We therefore find, as an ultimate fact to be incorporated in the judgment, that the evidence in this case does not tend to show or demonstrate wilful and wanton misconduct upon the part of the appellant, or that appellee sustained the injuries complained of because of any wilful and wanton misconduct on the part of appellant. The trial court should have granted appellant's motion at the close of all of the evidence for a directed verdict. On account of this error, the cause is reversed without remanding.

Judgment reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 648[1]

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9017 Agenda No. 51

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1935

Lillian Sayler,

Appellee

vs.

Appeal from the County Court of McHenry County.

Lester Edinger, Sheriff,

Appellant.

HUFFMAN, P.J.

This is an appeal prosecuted from the county court of McHenry County. William Ramsdell obtained a judgment against J. W. Sayler, husband of appellee, on March 31, 1935. Prior to that time, the said husband had been the owner of a Buick automobile, which he had purchased in 1928. It appears that on February 28, 1935, the said husband entered into a transaction with the Buss-Page Motor Sales Company for the purchase of a new automobile and delivered to said sales company the Buick automobile for a credit of One Hundred Dollars to be applied upon the purchase of the new car. He received what is designated as a retail buyer's order, which discloses the above facts. The said J. W. Sayler did not complete the purchase of the new car which he had contracted to do under date of February 28, 1935. About two months after this date, the appellee made an effort to get the motor sales company to return the Buick car. This they refused to do. Subsequently, and on April 14, 1935, appellee made purchase of the Buick from the said sales company for the sum of $100, whereupon the car was delivered to her by said company, together with a bill of sale for same. She later procured license plates for said car from the Secretary of State, under date of April 26, 1935. The judgment taken against her husband was entered

on March 31, 1933, as aforesaid. Execution issued upon this judgment under date of December 29, 1933. Pursuant to this execution, appellant, as sheriff, levied upon the Buickcar in question, under date of March 30, 1934. Appellee brought her replevin suit against the sheriff for the car, in a Justice of the Peace court. The trial had before the Justice resulted in favor of a judgment and finding for appellee. The appellant here prosecuted an appeal from that judgment to the county court, where the case was heard by the court, and a finding and judgment entered in favor of appellee. Appellant prosecutes this appeal from the judgment of the said county court.

Appellee insisted that the car in question was her property, and we are satisfied from the evidence that all parties concerned knew that she claimed ownership of the car at the time of the levy thereon. The evidence of Edward J. Buse of the Motor Sales Company discloses that appellee's husband had received a retail buyer's order for a new car and that he had received a credit upon such order of $100 on account of the trade-in value of the Buick. He further stated that after the Buick had been in storage about two months, that it was sold to appellee, and proper papers issued therefor, the appellee paying $50 in cash and executing her note for a like amount. This witness further stated that the $100 credit which had been given to appellee's husband remained to his credit on the books of the company, upon the purchase price of a new car, and that such credit was not transferable. This witness advised the sheriff prior to the levy, that the automobile in question did not belong to Mr. Sayler, but belonged to appellee, and that he had sold her the car.

The questions involved in this case are questions of fact. The case has been twice tried and each time resulted in a judgment in favor of appellee. After an examination of the record, we are of the opinion that the judgment of the trial court, under the facts, was correct. The judgment is therefore affirmed.

Judgment affirmed.

on March 13, 1883, as aforesaid. Upon the issues joined upon this, the
court below dated the December 23, 1883, rendered a final judgment,
upholding, on equity, Levitt upon the Tuesday 11 morning, under
date of March 7, 1884. Upholding Brewster for probate and setting
the equity for the way, in a petition of the Jewish court. The
court had before the initial proceeded it from of a judgment and
finding for equities. The aforesaid court proceeded on appeal from
that judgment to the equity court, where the case was tried by the
court, and a finding and judgment entered in favor of appellees, op-
pellant prosecutes this appeal from the judgment of the said equity
court.

Appellee insisted that the act in controlling was lawfully
and we are satisfied from the evidence that it was performed
upon that the alleged testamentary the act is not also of the law
therein. The evidence of Abbott is alone of the testimony taken
discloses that appellee's husband had received a notice signed
order for a law or act and that he had received a notice signed
order of Bill on account of the trade-in value of the letter. He
further stated that after the letter had been in his office about
months, that it was said to appellee, and from memory learned
therefore, the appellee replied it to was and remarked that was
for a life account. This evidence further showed that the letter
which had been given to appellee's husband remained in the middle
on the house of the company, upon the particular order of a new act,
and that such circumstances was not transpiring. That testimony adduced for
appellee relative to the letter, that the substitution did not
belong to the letter, but belonged to appellee, was left to the jury
for the act.

The question involved in this case was considered, the
case has been taken twice and upon this question is presented in
form of pleading. After the questionable of the record, we find of the
opinion that the judgment of the Bill should be reversed, and the cause
remanded. The judgment is then reversed.

Judgment reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 648

BE IT REMEMBERED, that afterwards, to-wit: on JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9020 Agenda No. 54

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1935.

D. J. L. Walther,

Appellant,

vs. Appeal from the Circuit Court,

Village of Algonquin, a Municipal Corporation, McHenry County.

Appellee.

HUFFMAN- P.J.

This was an action brought by appellant against appellee village to recover for services rendered as a civil engineer in connection with the survey of certain streets, done with a view to the paving of such streets by the village. The proposed special improvements were not carried out by appellee and the projects were abandoned. Subsequently, appellant instituted this suit to recover for such services upon quantum meruit. Jury was waived and the cause was heard by the court. Judgment was rendered in favor of appellee village. Appellant prosecutes this appeal from the judgment of the Court.

No ordinances providing for the proposed special improvements were ever passed. It is argued by appellant that appellee cannot avoid payment for the services rendered by him in connection with the proposed work, and that the city is liable out of the general fund. This rule as announced in Bunge v. Downers Grove San. Dist., 356 Ill. 551, has been recognized by this court where the facts in the case justify application of the rule. Anderson Co. v. City of Highland Park, 276 Ill. App. 327. However, in this case the testimony on ~~xxxxxxx~~ behalf of appellee is to the effect that it was expressly agreed with appellant that no compensation would be due or payable to him for any such services he might render, in

[illegible]

[illegible]

[illegible]

which the proposed work was not carried through to completion. The members of the Board of Local Improvements testified that appellant stated that he would go ahead with the work, taking his chances on its going through, and if it did not go through, there would be no cost. No records of any of the proceedings involved herein were kept by the Board. The appellant does not deny the statements of the board members as to the above agreement. His testimony is directed to the doing of the work, the fact that the improvements were not carried out, and that the sum of $930 is a reasonable charge for the work done. This evidence does not meet the issue as made by the testimony of appellee with reference to the alleged agreement with appellant, that no obligation would be incurred upon the part of the appellee because of such work, unless the proposed improvements were completed. A similar situation existed in a case recently before this Court. Ayres, Adm., v. Village of Glendale (Gen. No. 9014), wherein it was held that under such circumstances the parole agreement between the parties was competent evidence to be considered. We are therefore of the opinion that the judgment of the trial court in this case, under the evidence, was correct.

The judgment is therefore affirmed.

Judgment affirmed.

which the proposed contract was [illegible] by appellee. The members of the Board of Local Improvements testified that appellant stated that he would go ahead with the work, taking his chances on the paving warrants, and if it did not go through, there would be no work. No records of any of the proceedings [illegible] were kept by the Board. The appellant does not deny the statements of the board members as to the above statements. The [illegible] is directed to the doing of the work, the fact that the improvements were not carried out, and that the sum of $800 is a reasonable charge for the work done. This evidence does not meet the issue as made by the testimony of appellee [illegible] by the alleged agreement with appellant, that no obligation would be incurred upon the part of the appellee because of that work, unless the proposed improvements were completed. A similar situation existed in a case recently before this Court, [illegible] v. Village of [illegible] ([illegible]), wherein it was held that under such circumstances the parole agreement between the parties was competent evidence to be considered. We are therefore of the opinion that the judgment of the trial court in this case, under the evidence, was correct.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 8965 Agenda No. 44

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935

J. Weston Essington, Receiver of
the Utica State Bank, a corporation,

Appellant,

vs.

George M. Reynolds,

Appellee,

Appeal from the Circuit Court

of La Salle County

DOVE*J.

This was an action instituted by the Receiver of the Utica State Bank to enforce a liability against George M. Reynolds, one of the directors of said bank. The original declaration consisted of the common counts and twelve special counts. These were afterwards amended and an additional count filed. For the purpose of this opinion it will only be necessary to refer to the additional count. This count alleged that while the Utica State Bank was open and conducting a general banking business, at Utica, on June 12, 1931, in consideration that the Auditor of Public Accounts of the State of Illinois would sanction the continued business of the bank, and approve the assets of said bank, the bank being then insolvent and its capital impaired, the defendant then and there promised the bank that upon the transfer and delivery of certain securities which were assets of the bank to whomsoever John Wylie, J. S. Green, A. O. Esmond, N. J. Cary, W. W. Wylie, J. J. Hornung, E. E. Childers and the defendant, George M. Reynolds, should designate, he, the defendant Reynolds, would pay the bank the sum of $2,850.00 within a reasonable time thereafter; that although the bank at all times after the making of the promises was ready and willing and tendered and offered to deliver the securities to whomsoever the defendant would designate, and requested the defendant to designate some person

Sec. No. 8561 Agenda No. 14

In the Appellate Court of Illinois

Second District

October Term, a. D. 1934

J. Dexter Dunlington, Receiver of
the Crown State Bank, a corporation,

Appellant,

Appeal from the circuit court
of De Kalb county

vs.

George E. Reynolds,

Appellee.

Ryan, J.

This was an action instituted by the receiver of the Crown State Bank to enforce a liability against George E. Reynolds, one of the directors of said bank. The original declaration contained the common counts and twelve special counts. These were afterwards amended and an additional count filed. For the purpose of this opinion it will only be necessary to refer to the additional count. This count alleged that the Crown State Bank was open and conducting a general banking business, at Crown, on June 14, 1932, in consideration that the auditor of public accounts of the State of Illinois in would accept the existing condition of the bank, and approve the assets of said bank, the bank being then financially sound and its capital impaired, the defendant then and there promised the bank that upon the transfer and delivery of certain securities which were assets of the bank to Northwestern Trust Co., i. e. Grant, A. G. Ramond, R. J. Duty, J. W. Hyde, J. T. Kenney, J. E. Williams and the defendant, George E. Reynolds, should designate, he, the defendant Reynolds, would pay the bank the sum of $1,000.00 within a reasonable time thereafter; that although the bank at all times after the making of the promises was ready and willing and tendered and offered to deliver the securities to Northwestern Co. defendant would decline, and refused the defendant to designate some person

and to pay therefor, and although the State Auditor was ready and offered to sanction the continued business of the bank, and approve the assets of the bank, upon the removal of the said securities, yet the defendant designated no one to whom they should be transferred, and refused to pay the bank said sum of $2850.00. The count then alleged that the bank suspended business October 2, 1931, and that Essington was appointed Receiver, and acted as such until O'Connell was appointed, November 1, 1933; that the Receiver has kept said securities intact and segregated them from the other assets of the bank for the purpose of delivering them to any trustee designated by John Wylie, J. S. Greenk, A. O. Esmond, N. J. Cary, W. W. Wylie J. J. Hornung, E. E. Childers and the defendant, George M. Reynolds, yet they never have designated any trustee or paid for the securities.

To the amended declaration, the defendant filed a plea of general issue, with notice of special defenses on which he would rely. In his notice, defendant stated that he would insist that the instrument sued on was not signed nor agreed to by all of the parties therein named, and so not binding on the defendant; that there was no consideration for the signing of the purported agreement by said defendant; that said bank never set apart and never tendered the defendant or the other parties the said securities, or any portion of them; that the supposed agreement was not signed by the defendant in consideration that the Auditor of Public Accounts would sanction the continued business of the bank as alleged; that after the signing of the purported agreement, which was signed by the defendant and others, including one W. W. Wylie, said Wylie departed this life; that his estate was admitted to probate, and that thereafter Essington, as such receiver, filed a claim in the Probate Court of said La Salle County against his estate in the sum of $3,000.00, said claim being founded on the same identical supposed contract sued on in this cause; that said claim was disallowed by the Probate Court, and that the Receiver appealed

and to pay thereof, and although the state auditor was ready and
allowed to examine the continued business of the bank, and approve
the assets of the bank, upon the removal of the said securities, yet
the defendant designated no one to whom they should be transferred,
and refused to pay the bank said sum of $2000.00. The court then
alleged that the bank suspended business October 8, 1931, and that a
receiver was appointed thereto, and served as such until O'Donnell
was appointed, November 1, 1932; that the receiver has kept said
securities intact and segregated them from the other assets of the
bank for the purpose of delivering them to any trustee designated by
the style, F. . Green, v. F. Bennett, . . Ohio, . . F. Tyle F.
F. Bennett, H. E. Gilbert and the defendant, Harry . . Lamphile,
yet they never have designated any trustee or paid for the securities.

To the amended declaration, the defendant filed a plea of
general issue, with notice of special defenses on which he would rely.
In his notice, defendant stated that he would insist that the instru-
ment sued on was not signed nor agreed to by all of the written signa-
tures, and so not binding on the defendant; that there was no consid-
eration for the signing of the purported agreement by said defendant;
that said bank never set apart and never delivered the defendant or
other parties the said securities, or any portion of them; that the
proposed agreement was not signed by the defendant in consideration
that the Auditor of Public Accounts would authorize the continued busi-
ness of the bank as alleged; that after the signing of the purported
agreement, which was signed by the defendant and others, including one
F. . Tyle, said Tyle departed this life; that his estate was admitted
to probate, and that thereafter Lamphlen, as such receiver, filed
a claim in the Probate Court of said Lucas County against the
estate in the sum of $4,000.00, said claim being founded on the same
identical supposed contract sued on in this cause; that said claim
was allowed by the Probate Court, and that the receiver appealed

from the order and judgment of the Probate Court to the Circuit Court of said La Salle County, which court reversed the order of the Probate Court disallowing the claim, and entered a judgment against said estate for the sum of $3,000.00 and costs; that the administrator of said estate took an appeal to this court, which reversed said judgment and held that deceased never became bound by said purported agreement; that the purported resolution did not bind said deceased, and was not a binding contract on any of the parties who signed it, and that the only cause of action stated and relied on in this cause is the identical cause of action relied upon in the Wylie case for a recovery, and the finding of this Appellate Court in that case is conclusive that the purported contract was null and void, and that said judgment of this court constitutes an estoppel.

By agreement of the parties a jury was waived and the cause submitted to the court for determination, resulting in a finding and judgment for the defendant. From that judgment the Receiver has prosecuted this appeal and the record is here for review.

Upon the trial, by stipulation of the parties, the testimony introduced in the Wylie case was introduced as evidence in this case. This evidence is rather fully set forth in our former opinion, Essington v. Estate of Wylie, 273 Ill. App. 272, and it will therefore be unnecessary for us to here repeat what we there said. From all the evidence it appears that appellee, Reynolds, was a stockholder, director and president of the Utica Bank on May 27, 1931 and so continued until the bank suspended business on October 2, 1931 and was present and participated in the directors' meeting held in June, 1931, during or following the examination of the bank by representatives from the Auditor's office. Upon the hearing in the instant case, the several securities referred to in the resolution of the board of directors, which is set forth in the opinion of this court, Essington v. Estate of Wylie, supra, at pages 274 and 275, and which came into the hands of the receiver when the bank

from the order and judgment of the Probate Court to the circuit court of Wells in Ballie County, which court reversed the order of the Probate Court disallowing the claim, and entered a judgment against said estate for the sum of $5,000.00 and costs; that the administrator of said estate took an appeal to this court, which reversed said judgment and held that deceased never became bound by said purported agreement; that the purported resolution did not bind said deceased, and was not a binding contract on any of the parties who signed it, and that the only cause of action stated and relied on in this case is the identical cause of action relied upon in the Ville case for a recovery, and the finding of this appellate court in that case is conclusive that the purported contract was null and void, and that said judgment of this court constitutes an estoppel.

By agreement of the parties a jury was waived and the cause submitted to the court for determination, resulting in a finding and judgment for the defendant. From that judgment the Dossier has prosecuted this appeal and the record is here for review.

Upon the trial, by stipulation of the parties, the testimony introduced in the Ville case was introduced as evidence in this case. This evidence is rather fully set forth in our former opinion, Washington v. Estate of Ville, 275 Ill. App. 272, and it will therefore be unnecessary for us to here recast what we there said. From all the evidence it appears that Orville, Dorville, was a stockholder, director and president of the Ville Bank on May 27, 1921 and so continued until the bank suspended business on October 3, 1921 and was present and participated in the directors' meetings held in June, 1921, during or following the examination of the bank by representatives from the auditor's office. [illegible] the instant case, the account documents [illegible] in a resolution of the board of directors, which is not found in the opinion of this court, Washington v. Estate of Ville, [illegible], at pages 271 and 272, and which came into the hands of the receiver when the bank

suspended business, were tendered by counsel for the plaintiff to the defendant and to the other directors or to anyone whom they would designate as trustee for their benefit.

It is the contention of appellant that the evidence discloses that appellee, acting in his individual capacity, promised to pay the bank $2850.00 on June 12, 1931; that the consideration therefore was that the bank would deliver the depreciated securities referred to in the resolution to appellee and to the other directors and officers or to someone to be designated by them as trustee therefor, and that by reason of this promise of the appellee and the other directors and cashier of the bank, the Auditor of Public Accounts delayed further action and permitted the bank to remain open.

The evidence discloses and in our former opinion we said that after the adoption of the resolution and after the writing of the letter which is also set forth in that opinion, no further action was taken by the board of directors or any of the individual directors to carry out the schemes set forth either in the resolution or in the letter. The securities enumerated in the resolution were never removed and were the property of the bank at the time it suspended the transaction of business and are now in the possession of the receiver, and that the Auditor of Public Accounts had knowledge that the members of the board of directors of the bank and the several individual members of the board had not taken out the securities and had not paid the sum of money into the bank which the resolution called for. Furthermore, the chief examiner testified upon the hearing that there was no declaration upon his part to the officers or directors of the bank that unless the assets enumerated in the resolution were removed and replaced with cash that he would close the bank, nor is there any evidence that any promise or offer of any kind was made by the auditor or his representatives to the directors. We, therefore, adhere to our former holding to the effect that the resolution and letter were merely voluntary offers upon the part of ~~him~~ appellee and the

other officers of the bank to pay into the bank a given sum of money when the bank placed in trust for all of them the enumerated securities. This was not done and the voluntary offer was never accepted prior to the time the bank suspended business and closed its doors as a banking institution.

We adhere also to our former opinion wherein it is stated that this undertaking was a joint one and if all of the parties named in the resolution did not agree to its terms, then none of the parties would be bound thereby, and the evidence is that all did not agree. Hornung was one of the directors and he was not present and did not participate in any way, while Childers was not a director, although he was cashier of the bank.

For the reasons stated in our former opinion, the judgment of the trial court is correct and is therefore affirmed.

Judgment affirmed.

[illegible] officers of the bank to pay into the bank a given sum of money when the bank placed in trust for all of them the unmortgaged securities. This was not done and the voluntary offer was never accepted prior to the time the bank suspended business and closed its doors as a banking institution.

We adhere also to our former opinion wherein it is stated that this undertaking was a joint one and if all of the matters named in the resolution did not agree to its terms, then none of the parties would be bound thereby, and the evidence in this all did not agree. Moreover one of the directors and he was not present and did not participate in any way, while Ohlmire was not a director, although he was cashier of the bank.

For the reasons stated in our former opinion, the judgment of the trial court is correct and is therefore affirmed.

-Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 8971 Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1935.

Louise Becker,

Appellant

vs.

Appeal from the Circuit Court of Will County.

Edward Schwartz, Jr. and The Chicago, Rock Island and Pacific Railway Company, a Corporation,

Appellees.

DOVE, J:

On December 22, 1934, Louise Becker filed her amended declaration in the Circuit Court of Will County to recover damages for personal injuries. Edward Schwartz and The Chicago, Rock Island and Pacific Railway Company were defendants. To this amended declaration, which consisted of five counts, a general demurrer was interposed by each defendant and upon a hearing the demurrers were sustained and the plaintiff, desiring to abide by her amended declaration, refused to plead further and from a judgment in bar of the action and against the plaintiff for costs of suit, the record is brought to this court for review by appeal.

In each count of the amended declaration it is alleged that on October 28, 1931 the Railway Company was operating a train upon its tracks at a certain crossing known as the Cass Street crossing in the City of Joliet, that appellant was riding in an automobile driven by appellee Schwartz on Cass Street, that appellant was then and there using due care and caution for her own safety and that the automobile in which she was riding collided with the train of the Railway Company, which was standing across the highway known as the Cass Street crossing and as a result thereof, appellant received the injuries to recover for which this suit was instituted.

Oct. 7th, 1921.

IN THE
APPELLATE COURT OF INDIANA.
October Term.

Antonio Trem, v. C. Lynn.

Louisa Tarter,

Appellant

vs.

Edward Schwartz, Jr. and
The Chicago, Rock Island and
Pacific Railway Company,
Corporation,

Appellees.

Appeal from the Circuit
Court of Vigo County.

OPIN. 1:

On December 22, 1920, Louisa Barker filed her amended declaration in the Circuit Court of Vigo County to recover damages for personal injuries. Edward Schwartz and The Chicago, Rock Island and Pacific Railway Company were defendants. To this amended declaration, which consisted of five counts, a general demurrer was interposed by each defendant and upon a hearing the demurrers were sustained and the plaintiff, desiring to abide by her amended declaration, refused to plead further and from a judgment in favor of the latter and against the plaintiff for costs of suit, the record is brought to this court for review by appeal.

In each count of the amended declaration it is alleged that on October 29, 1921 the Railway Company was operating a train upon its tracks at a certain crossing known as the Case Street crossing in the City of Joliet, that appellant was riding in an automobile driven by appellee Schwartz on Case Street, that appellant was then and there using due care and caution for her own safety and that the automobile in which she was riding collided with the train of the Railway Company, which was standing across the highway known as the Case Street crossing and as a result thereof, appellant received the injuries to recover for which this suit was instituted.

The first count charged the Railway Company with general negligence in the operation of its train and charged the appellee Schwartz with general negligence in the operation of his automobile. The second count charged the Railway Company with general negligence in the operation of its train and alleged that Cass Street was a paved highway, a main thoroughfare, heavily traveled and that the crossing is a dangerous one frequented by trains and switch enginges and that frequently trains are permitted to stand across the intersection with no warning lights of any kind, that the intersection is dark and the view of approaching trains obstructed, all of which was well known to appellee Schwartz. It was then averred that Schwartz, knowing the same, and with a conscious indifference to surrounding circumstances, wilfully and wantonly drove his automobile in the night time at sixty miles per hour, which was a high and dangerous rate of speed, without keeping a lookout for cars approaching or standing upon the crossing and without having his car under such control as to be able to stop or avoid the train which at that time obstructed the highway, and that he wilfully and wantonly drove his automobile, in which appellant was riding, into the side of the cars of the railway company then standing or slowly moving upon the crossing. The third count is substantially the same as the second count, but in addition charges that the negligence of the Railway Company concurred with the wilful and wanton misconduct of the appellee Schwartz, resulting in the collision, whereby the plaintiff sustained injuries. The fourth count alleged that appellant was a passenger in the car driven by appellee Schwartz, and that Schwartz was guilty of wilful and wanton misconduct as alleged in the second count. In this count it was alleged that the highway over the grade crossing is heavily travelled by motor vehicles and foot passengers, that the view of the tracks in both directions was obstructed for persons travelling in either direction upon the highway by buildings and other obstructions which were built up close to the railroad tracks on both sides, that it was impossible for persons passing along and upon the high-

The first count charged the Railway Company with general negligence in the operation of its train and charged the appellee Somerset with general negligence in the operation of his automobile. The second count charged the Railway Company with general negligence in the operation of its train, and alleged that Dean Street was a paved highway, a main thoroughfare, heavily traveled and that the crossing is a dangerous one frequented by trains and autos, engines and that frequently trains are permitted to stand across the intersection with no warning lights of any kind, that the intersection is dark and the view of approaching trains obstructed, all of which was well known to appellee Somerset. It was then averred that Somerset, knowing the same, and with a conscious indifference to surrounding circumstances, willfully and wantonly drove his automobile in the night time at sixty miles per hour, which was a high and dangerous rate of speed, without keeping a lookout for cars approaching or attempting to cross the crossing and without having his car under such control as to be able to stop or avoid the train which had obstructed the highway, and that he willfully and wantonly drove his automobile in which appellant was riding, into the side of the cars of the Railway company than attempting or slowly moving upon the crossing.

The third count is substantially the same as the second count, but in addition charges that the negligence of the Railway Company concurred with the willful and wanton misconduct of the appellee Somerset, resulting in the collision, whereby the plaintiff sustained injuries.

The fourth count alleged that appellant was a passenger in the car driven by appellee Somerset, and that Somerset was guilty of willful and wanton misconduct as alleged in the second count. In this count it was alleged that the highway over the tracks crossing is heavily traveled by motor vehicles and foot passengers, that the view of the tracks in both directions was obstructed by various structures in either direction upon the highway by buildings and other obstructions which were built up close to the railroad tracks on both sides, that it was impossible for persons passing along and upon the high-

way to observe the approach of trains and that for these reasons the crossing was extremely dangerous and an unusually hazardous railroad crossing. In this count it was further averred that such a condition had existed for many years, was well known to the Railway Company and that no sign or warning of any kind existed in the highway to advise traffic travelling on the highway of the presence of this railroad crossing. It was then alleged that it therefore became the duty of the Railway Company to use reasonable care to give warning to traffic approaching on the highway of the presence there in the night time of their train and that the Railway Company negligently failed and omitted to warn traffic in any manner of the presence of the train. The fifth count repeated the allegations of the other counts as to the location of the tracks and surrounding conditions and as to appellant riding in the car of Schwartz as a passenger. In this count it was charged that Cass Street was a frequently travelled street and extended for many blocks from the crossing, which was a grade crossing, through a thickly and densely populated community in Joliet. It was then averred that the Railway Company, recognizing the extremely dangerous and unusually hazardous character of the crossing, arranged for and for a long time prior to the collision in question had used a flagman to warn highway traffic of the presence of its trains, and that it was a matter of common knowledge in the City of Joliet that a flagman or brakeman would be present and give notice or warning of the presence of its trains at or upon said crossing. This count then averred that the Railway Company wilfully and wantonly neglected to give any warning or furnish any light whereby persons might discover the presence of its train upon the night in question and that by reasons of its wilful and wanton misconduct in this respect, appellant was injured. The allegations of the second count as to the conduct of appellee Schwartz in driving his car wilfully, wantonly and with a conscious indifference to the surrounding circumstances which were alleged and which it was charged were well known to this appellee, were repeated in this count.

way to observe the approach of trains and that for these reasons the crossing was extremely dangerous and an unusually hazardous railroad crossing. In this count it was further averred that such a condition had existed for many years, was well known to the Railway Company and that no sign or warning of any kind existed in the highway to advise traffic traveling on the highway of the presence of this railroad crossing. It was then alleged that it therefore became the duty of the Railway Company to use reasonable care to give warning to traffic approaching on the highway of the presence thereon in the night time or have lights or flagmen or other protection at said crossing, which duty said the Railway Company failed and neglected to take steps in any manner of the presence of the train. The fifth count repeated the allegations of the other counts as to the location of the tracks and surrounding conditions and as to appellant riding in the car of defendant as a passenger. In this count it was charged that Cass Street was a frequently travelled street and existed for many years prior to the crossing, which was a grade crossing, through a thickly and densely populated community in Mobile. In the view adopted by the Supreme Court, recognizing the extremely dangerous and unusually hazardous character of the crossing, arranged for and for a long time prior to the collision in question and used a flagman to warn highway traffic of the presence of its trains, and that it was a matter of common knowledge in the City of Mobile that a flagman or brakeman would be present and give notice or warning of the presence of its trains at or upon said crossing. This count then averred that the Railway Company wilfully and wantonly neglected to give any warning or furnish any light whereby persons might discover the presence of its train upon the night in question and that by reasons of its wilful and wanton misconduct in this respect, appellant was injured. The allegations of the second count as to the conduct of appellee consisted in driving his car wilfully, wantonly and with a conscious indifference to the surrounding circumstances which appellant and/or then it was charged were well known to this appellee, very recently in this count.

In their argument, counsel for appellee Schwartz concede that the second, third, fourth and fifth counts of the declaration contain sufficient averments as to wilfulness and wantonness so as to state a cause of action, but they insist that appellant failed in these counts to aver due care and caution for her own safety. This is a misapprehension, as each of these counts contain such an averment. For instance, the second count, after alleging the possession on October 28, 1931, of a railroad engine and cars by the appellee railway company and the operation thereof at the Cass Street crossing, then averred that appellant "was then and there riding in a certain automobile upon and along said Cass Street toward said railroad train at said crossing and was then and there using all due care, caution and diligence for her own safety". Furthermore, contributory negligence is no defense or excuse for wilful and wanton misconduct and if this allegation of due care and caution upon the part of appellant had been omitted, still these counts, as to appellee Schwartz, were not obnoxious to a general demurrer. Montonya v. Wilbur Lumber Co., 251 Ill. App. 364, and cases there cited.

In the argument of counsel for appellant it is stated that the negligence charged in the declaration is that the railway company blocked a dark crossing with its train and failed to give warning of the presence of the train by lighting or by any other method or manner. The Commerce Commission has sole and exclusive jurisdiction under the Statute of all railroad crossing and it will be observed that the declaration does not charge that the railway company violated any statute, ordinance, regulation or order of the Commerce Commission and in our opinion the alleged acts of the railway company cannot be said to constitute negligence on its part. The charge that the highway extended through a thickly and densely populated community, that it was extensively traveled, that the view of the track was obstructed and that there were no signs to advise the traffic of the presence of the crossing makes no charge of negligence against the railway company.

In their argument, counsel for appellee (Amerts) contends that the second, third, fourth and fifth counts of the declaration contain sufficient averments as to willfulness and wantonness so as to state a cause of action, but they insist that appellant failed in these duties to exercise due care and caution for her own safety. This is a wrongful-death action, as each of these counts contain such an averment. For instance, the second count, after alleging the happening on October 19, 1951, of a railroad engine and cars by the decedent railroad company and the particular injury to her that caused her death, alleges that appellant "was then and there riding in a certain automobile upon and along said Oak Street when said railroad train at said crossing was then and there being run over, driven and diligence for her own safety". Furthermore, contributory negligence is no defense or excuse for willful and wanton acts, and if this allegation of due care and caution on the part of appellant had been omitted, still these counts, as the appellee Somerts, were not obnoxious to a general demurrer. Northern v. Illinois Lumber Co., 324 Ill. App. 324, and cases there cited.

In the argument of counsel for appellant it is asserted that negligence charged in the declaration is that the railroad company blocked a dark crossing with its train and failed to give warning of the presence of the train by lighting or by any other method or manner. The Commerce Commission has sole and exclusive jurisdiction under the statute of all railroad crossings and it is in evidence that the decedent does not aver that the railway company violated any statute, ordinance, regulation or order of the Commerce Commission and in our opinion the alleged acts of the railway company cannot be said to constitute negligence as its part. We agree that the highway extended through a public and densely populated community, that it was extensively traveled, that the view of the crossing obstructed and that there were no signs to advise the traveler of the presence of the crossing nor any of negligence against the railway company,

nor is the averment that the company wilfully and wantonly neglected to give any warning or furnish any light whereby persons might discover the presence of its train upon the night in question sufficient. And while it is well settled that where the injury is the result of the negligence of two persons, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury, Pullman Palace Car Co. v. Laack, 143 Ill. 242, still before a recovery can be had, the declaration must appropriately charge either negligence or wilful and wanton conduct. The declaration here, in our opinion, makes no charge of actionable negligence or wilful or wanton conduct against the railway company and therefore the trial court properly sustained the demurrer thereto. In Chicago City Railway Co. v. Jennings, 157 Ill. 274, relied upon by appellant, it was alleged that as the car of the defendant was proceeding along Cottage Grove Avenue, near to the intersection of Seventeenth Street, it ran into and struck the carriage in which the plaintiff was riding, while in the instant case it was averred that the automobile in which the plaintiff was riding was proceeding along Cass Avenue and struck the railroad train which was lawfully upon the crossing.

It is finally insisted by both appellees that the demurrer interposed by each defendant was properly sustained to the amended declaration because it appears from each count of the declaration that the injuries which appellant sustained were received by her on October 28, 1931 and that therefore the action is barred by the Statute of Limitations. It is elementary that at law the defense that a suit is barred by the Statute of Limitations must be affirmatively pleaded and the question is not presented by a demurrer to the declaration. Wall, Admx. v. The Chesapeake and Ohio Railroad Co., 200 Ill. 66.

The trial court did not err in sustaining the demurrer of the railway company and in rendering judgment in its favor in bar of the action and for costs, but in our opinion the second, third, fourth and fifth counts of the declaration were not obnoxious to the

nor is the argument that the company wilfully and wantonly neglected to give any warning or furnish any light whereby persons might discover the presence of its train upon the highway sufficient. Indeed, it is well settled that where the negligence of two persons, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury, Chicago Union Traction Co. v. Cooney, 147 Ill. 340; still between a passenger and the dead machine must appropriately share either negligence or wilful and wanton conduct. The decisions here, in our opinion, make no choice of distinctive negligence to either or wanton misconduct against the railway company and therefore the trial court properly sustained the demurrer thereto. In Chicago City Railway Co. v. Lommen, 187 Ill. 274, relied upon by appellant, it was alleged that as the car of the defendant was approaching Halsted Street, near to the intersection of Fourteenth Street, it was late and struck the carriage in which the plaintiff was riding, while in the instant case it was averred that the automobile in which the plaintiff was riding was proceeding along Oak Street and struck the railroad track which was laid upon the crossing.

It is finally insisted by both appellees that the demurrer interposed by each defendant was properly sustained on the ground of deliberation because it appears from each count of the declaration that the injuries which appellant sustained were received by her on October 22, 1908, and that therefore the action is barred by the Statute of Limitations. It is elementary that at law the failure that is barred by the Statute of Limitations must be affirmatively pleaded and the demurrer is not proper unless it appears on the face of the declaration. Wall, Admr. v. The Chicago Junction Ry., 240 Ill. 44.

The trial court did not err in sustaining the demurrer of the railway company and in entering judgment in favor in bar of the action and for costs, but in our opinion the second, third, fourth and fifth counts of the declaration were not demurrable to the

general demurrer of the defendant Schwartz and the trial court therefore erred in sustaining his demurrer and rendering judgment in his favor and for that error the judgment in favor of defendant Schwartz is reversed and this cause is remanded with directions to overrule the demurrer of this defendant to the second, third, fourth and fifth counts of the amended declaration.

The judgment in favor of The Chicago, Rock Island and Pacific Railway Company is affirmed. The judgment in favor of Edward Schwartz, Jr. is reversed and the cause as to this defendant is remanded with directions.

AFFIRMED AS TO THE C. R. I. AND P. RY CO.
REVERSED AND REMANDED AS TO DEFENDANT SCHWARTZ.

general demurrer of the defendant Sedworth and the trial court thereafter erred in sustaining the demurrer and entering judgment in his favor and for that error the judgment in favor of defendant Sedworth is reversed and this cause is remanded (4) directions to overrule the demurrer of this defendant to the second, third, fourth and fifth counts of the amended declaration.

The judgment in favor of the plaintiff, and against the Railway Company is affirmed. The judgment in favor of Edward Sedworth, is reversed and the cause as to this defendant is remanded with directions.

Affirmed in No. 6. R. R. Div. 2. ET CA.

Reversed in Division 1 of Supreme Court.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9001 Agenda No. 26

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1935

Roy H. Rufi,

Appellant,

vs.

Walter G. Critchlow, doing business as Walter G. Critchlow Organization,

Appellee.

Appeal from the Circuit Court of Winnebago County.

DOVE, J.

This is an appeal from a judgment of the Circuit Court of Winnebago County, rendered upon a directed verdict in favor of the defendant at the close of the plaintiff's evidence.

The complaint consisted of two counts. The first one set forth a written contract and alleged that the written agreement was entered into by the parties to the action on November 20, 1934. The agreement recited that the defendant (designated in the contract as the manufacturer) was the inventor, manufacturer and distributor of a gas and oil saving apparatus designated as a humidifier suitable for attachment on automobiles and other internal combustion engines and that the purpose of its use was to save gasoline and oil, eliminate carbon, increase power and speed, save repair and upkeep cost and lengthen the life of the engine through better lubrication and combustion. The contract further recited that the plaintiff (designated in the contract as the manager) had personally examined and tested said humidifiers and was thoroughly satisfied with their utility, operation and potential sales possibilities, and that he desired to secure the exclusive right to distribute them in a certain specified district. Clause 6 of the contract provided: "That the said manufacturer agrees

to and does hereby sell to the said manager the number of humidifiers specified herein, at the prices attached hereto and made a part of this agreement, on the terms specified herein, subject to a 50% discount." The prices attached are as follows: "Automatic model VIX $25.00; Model SVIX $16.00; Model A-2 VIX $10.00; Double mileage VIX $8.00; Gas-saver, VIX model $5.00." The contract then provided that in consideration of the covenants and agreements therein named and in consideration of the purchase by the manager of "1250 humidifiers to be ordered, shipped and delivered as specified herein and a down payment of $1250.00 to the manufacturer in hand paid by the said manager, which sum of $1250.00 is to be applied as payment on the above mentioned humidifiers at the rate of $1.00 on each humidifier ordered or caused to be ordered, the said manufacturer does hereby agree to grant to the said manager the sole and exclusive sale of humidifiers in Winnebago and Boone County." It was then provided that the agreement was entered into for a period of three years from date, but reserved the right to the manufacturer to cancel the same upon notice. By the terms of the contract the manufacturer agreed to give the manager $50.00 per week upon receipt of the first weekly report and upon receipt of subsequent weekly reports and to allow the manager $60.00 per month for rent and to provide an experienced service man to personally instruct and help the manager in getting started, this instruction to be given at the factory in Wheaton or at the location of the manager, whichever is most convenient in the judgment of the manufacturer. Clauses 28-29 and 30 and 33-34 of the contract are as follows: "The manufacturer will pay the Manager four per cent (4%) interest during the life of this agreement, computed semi-annually on any part of the money referred to in clause six of this agreement, that has not already been refunded, returned or withdrawn by virtue of orders placed and filed. In consideration of the exclusive protection and wholesale prices herein granted to the Manager by the Manufacturer the Manager agrees to order and pay for a quantity of Humidifiers of

the various models equal to or the equivalent of $150.00 net cash paid in to the Manufacturer each week, beginning with the next calendar month following the date hereof; either through his own efforts or those of his dealers, distributors, agents, subservice station operators, salesmen, canvassers, etc., appointed by the Manager, but any excess amount paid in any week shall count on future weeks' requirements. In the event that circumstances should arise that would make it expedient or necessary for the Manager to discontinue, due to sickness, ill health, accident, or for any reason whatsoever, upon notification in writing from the Manager, his heirs, executors or assigns, the Manufacturer agrees to co-operate with the Manager, his heirs, executors or assigns for the purpose of securing another man in his place to take over this agreement and continue with it on the same basis as set forth herein; and, further, the Manufacturer, upon receipt of such notification from the Manager, his heirs, executors, or assigns and the return to the Manufacturer in good condition of any merchandise or materials that are unpaid for, will immediately readvertise, to accomplish this same purpose as quickly as possible, in order that the Manufacturer's business may be continued without interruption in the district specified herein. When said replacement and transfer is made during the life of this agreement the Manufacturer will refund to the Manager, his heirs, executors or assigns any portion or part of the $1,250.00 referred to in the sixth clause hereof, that has not already been refunded, returned or withdrawn by virtue of orders placed. Failure to comply with any of the requirements of this agreement by the said Manager shall ipso facto annul and revoke same without recourse of either party hereto against the other, and all rights and liability of either party hereto shall thereupon cease and terminate. The Manager has read this agreement over very thoroughly and fully understands and accepts the terms and conditions of same."

The complaint then alleged that the plaintiff opened an office in Rockford under the contract for the purpose of selling humidifiers manufactured by defendant. That he paid defendant the sum of $725.00 cash and $525.00 by note, or a total of $1250.00. That the defendant refused to pay plaintiff the rent of $50.00 per month for three months and refused to pay plaintiff $50.00 per week for three weeks. That in so doing defendant violated the terms of his agreement and plaintiff having no funds other than what he paid the defendant was unable to continue the business and was compelled to close the office in Rockford. That after finding it impossible to continue in business, plaintiff notified defendant in writing, according to the provisions of the agreement and the defendant advertised for a man to take plaintiff's place and assume the agreement and although the plaintiff has requested defendant to refund to the plaintiff the moneys due and owing him, defendant has refused so to do and therefore the plaintiff demanded judgment for the sum due him, together with 4% interest thereon from November 20, 1934.

The second count alleged that the parties entered into the written contract set forth in the first count and that by the provisions thereof the plaintiff was required to deposit with the defendant the sum of $1250.00 to be held by the defendant as a cushion or surety. That the defendant wrongfully, wilfully, wantonly and maliciously, with intent to defraud and deceive the plaintiff obtained said moneys from the plaintiff under the agreement that they would be returned to the plaintiff upon the termination of said agreement. That by the agreement, the defendant was to furnish the plaintiff $50.00 per month for office rent, which he failed to do for three months and was to pay the plaintiff a salary of $50.00 per week for three weeks, which he failed to do, and therefore plaintiff says he was damaged and injured by the wrongful, wilful, wanton and malicious conduct of the defendant and was grossly defrauded by him.

The defendant answered, and upon the hearing the only witness who testified was the appellant. His evidence discloses that on the 20th day of November, 1934, the appellant and appellee entered into the contract set forth in the complaint. At that time appellant paid appellee $715.00 in cash and gave him his note for $535.00, making a total of $1250.00. The evidence further discloses that appellee sent a man to Rockford from his factory to help appellant start his work under the contract; that an office was rented in Rockford and $50.00 in rent was paid by the appellee under the contract for the month of December, 1934; that appellee paid appellant four weekly payments for salary of $25.00 each and credited four $25.00 payments on appellant's note of $535.00. Appellee made no other payments to appellant for salary and refused to pay rent after the first payment. Under the agreement, according to the testimony of appellant, the humidifier was to sell for $20.00, one-half of which was to be appellant's compensation for making the sale. Appellant was also to retain out of the selling price one dollar on each machine sold until the $1250.00 which he had paid under the contract was refunded to him.

Appellant, according to his testimony, commenced work under the contract on November 20th, 1934, but was able to sell only six of the humidifiers. The appellee delivered thirty-five of the devices to the appellant, but they were all returned by appellant, except the six which he sold. Appellant testifies that he requested the appellee to furnish him a Service man as called for in the contract, to help on the demonstration and sale of the machine, but the appellee never furnished him such assistance. On the 7th of January, 1935, the appellant returned the humidifiers which he had in stockand informed appellee's secretary that he was quitting and for appellee to get some one else to take his place. Appellee has not returned to the appellant any part of the $1250.00 which appellant paid or gave his note for under the contract, and it is to recover this money that this suit was brought.

The defendant answered, and upon the hearing the only witness who testified was the appellant. The evidence discloses that on the [illegible] day of November, [illegible], the appellant and appellee entered into the contract set forth in the complaint. At that time appellant paid appellee $[illegible] in cash and gave him his note for $[illegible], making a total of $[illegible]. The evidence further discloses that appellee sent a man to Rockford from his Chicago office to help appellant start his work under the agreement; that an office was opened in Rockford and $[illegible] in rent was paid by the appellee under the contract for the month of December, [illegible]; that appellee paid appellant four weekly payments on a salary of $[illegible] each and credited [illegible] payments on appellant's note of $[illegible]. Appellee made no other payments to appellant for salary and refused to pay rent after the first payment. Under the agreement, according to the testimony of appellant, the humidifier was to sell for $[illegible], one-half of which was to be appellant's compensation for making the sale. Appellant was also to retain out of the selling price one dollar on each machine sold until the $[illegible] which he had paid under the contract was returned to him.

Appellant, according to his testimony, commenced work under the contract on December [illegible], [illegible], but was able to sell only six of the humidifiers. The appellee delivered thirty-five of the devices to the appellant, but they were all returned by appellant, except the six which he sold. Appellant testified that he requested the appellee to furnish him a service man as called for in the contract, to help in the demonstration and sale of the machines, but the appellee never furnished him such assistance. On the [illegible] of January, 1947, the appellant returned the humidifiers which he had in stock and informed appellee's secretary that he was quitting and for appellee to send some one else to take his place. Appellee has not returned to the appellant any part of the [illegible] which appellant paid or gave his note for under the contract, and it is to recover this money that this suit was brought.

Appellant contends that the complaint is based upon an action in tort, charging wilful, wanton and gross fraud, with an intent to deceive the appellant and obtain his money. However, the complaint sets out the contract in haec verba and alleges as a breach thereof appellee's failure to pay the appellant's weekly salary and his rent. A careful reading of appellant's evidence fails to disclose any evidence whatever in support of the allegation of fraud and if the appellant's theory is, as he contends, that the action is based on a tort, there is no evidence at all in the record to support the appellant's case and there was no error in the court directing a verdict in favor of appellee.

The complaint,as above stated, sets out the contract in haec verba and alleges as a breach thereof the failure of appellee to pay appellant the weekly salary and monthly rent as therein provided. It is our opinion that under this contract, appellant purchased 1250 of the mechanical devices, known as humidifiers, and that the $1250.00 which he paid or obligated himself to pay was to be taken in the manner of a $1.00 down payment on each humidifier. It is contended, however, by appellant that a supplemental agreement between the parties was entered into by the provisions of which appellant could quit at any time and be liable only for the humidifiers he had actually bought and sold. This supplemental agreement does not support this contention on the part of the appellant because it provides as follows: "Please enter my blanket order for 1250 units of the Vix Vapor Process of Scientifically Air Conditioning and Humidifying and Gas and Oil Saving Apparatus, manufactured in five different Models, upon which a prepayment of $1.00 each, amounting to a total of $1250.00 is made," and "There is no obligation for me to take any but the models I need for my trade. I do not have to take this entire order unless I choose. I can stop at any time I desire. I am not obligated beyond the prepayment made." This supplemental agreement or order of the appellant does not mean that he could quit at any time and be obligated only for the humidifiers

actually bought and sold, but means that appellant would quit at any time and not be obligated beyond the prepayment which he had already made in the amount of $1250.00. Appellant in this case is suing on the contract and by alleging performance on his part, he is not entitled to recover unless he proves that he performed his part of the contract. Turner v. Osgood Art Color-type Co., 223 Ill. 629; Abeles and Taussig L. & T. Co. v. N. W. Side L. Co., 239 Ill. App. 625; Liberty Export and Import Corporation v. Swift & Co., 231 Ill. App. 1. Inasmuch as the evidence fails to prove that the appellant performed his part of the contract in accordance with its terms, the trial court properly directed a verdict for the appellee at the close of appellant's case.

The judgment of the Circuit Court is therefore affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

67 A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 649

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Ann. Rep. 8412 Lincoln No. 20

In the Appellate Court of Illinois

Second District

October Term, A. D. 1920.

The T. T. Teplitz Company,

Appellant,

vs.

Edward G. Tully and Walter J. Autry,

Appellees.

Appeal from the Circuit Court of Lake County.

MOTT, J.

On April 27, 1914 this suit was instituted in the Circuit Court of Lake County. The complaint alleged that on January 2, 1912 one A. L. Benedict entered into a contract with the plaintiff, by the terms of which the plaintiff, the T. T. Teplitz Company, agreed to sell to Benedict personal properties of the reputed of a chandelier piano on time on Benedict's sign order. By the terms of the contract Benedict agreed to pay the plaintiff for such property and to pay it any balance due the plaintiff for goodwill personally and his under future earnings. The contract provided that it might be terminated by either party and that terminated it account's interest thereunder would immediately become due and if not terminated by the action of the parties, that then it could notify on December 31, 1912. Attached to the contract was an agreement executed by G. G. Tully and A. J. Autry by the provisions of which they agreed themselves to guarantee and agreed to pay the Teplitz Company the sum made and to indemnify together with all prior indebtedness the Teplitz Company. Then included at the date of the execution of the contract which was January 2, 1912. The complaint then filed that before expiring time this contract with Benedict is but well and indicted to his its property, the which he was indebted to it in the sum of $1000.00.

That during the year 1933 it sold and delivered to him products of the value of $273.36, and that during that period of time Benedict paid to the plaintiff $863.60, so that the plaintiff sought to recover in the instant proceeding the sum of $1996.61. The action is brought against H. G. Kelly and M. J. Andrew, upon whom service was had and the appearance of these defendants was entered by their attorneys and before answering the complaint a motion was entered in their behalf for an order requiring the plaintiff to join as co-defendants E. C. Bittel, A. F. Engelke, James Mills, Melville R. Leach, William C. Lomas, Albert O. Swert and Lawrence S. Frederick, four of whom reside in Beloit, Wisconsin and the remaining three in Boone County, Illinois. This motion was supported by the affidavit of the defendants Kelly and Andrew, in which it is stated that the contract which forms the basis of this suit is one of a series of such contracts entered into by the plaintiff and Benedict. That on November 18, 1925 the first one of such contracts was made and the payments thereunder were guaranteed by said Leach, Bittel and Frederick; that on January 3, 1927 another such contract was entered into between the plaintiff and Benedict and the payments thereunder guaranteed by said Bittel, Engelke and Leach; that on March 30, 1927 another such contract was entered into by plaintiff and Benedict and the payments thereunder guaranteed by said Bittel, Engelke and Mills; that on January 5, 1928 a like contract was entered into, the payments thereunder being guaranteed by said Engelke, Bittel and Mills; that on January 2, 1929 a like contract was entered into and the payments guaranteed by said Engelke, Lomas and Swert; that on January 2, 1930 and January 2, 1931 like contracts were again entered into and the payments provided in each contract were guaranteed by said Swert, Lomas and Kelly; that on August 31, 1931 another contract was entered into and the payment therein provided were guaranteed by said Kelly, Andrew and Lomas.

The record then discloses that the plaintiff filed an instrument in which it offered to sell to the defendants for $1900.00 all the right, title and interest it has in any claim or demand it might

have against any or all of the seven parties whom the defendants desired to have made additional parties defendant. No action seems to have been taken by the court upon this offer, but an order was entered directing the plaintiff to name the said Bittel, Engelke, Mills, Leach, Lomas, Swart and Frederick as co-defendants, ordered the clerk to issue a summons for each of them and provided that each defendant should have fifteen days time in which to answer the amended complaint when filed. Thereupon another notice of appeal by the plaintiff was filed and the record is in this court for review.

The printed statement, brief and argument on behalf of appellees was filed herein on October 19, 1935. Subsequently on October 14, 1935 counsel for appellees filed herein their typewritten motion to dismiss the appeal on the ground that the order from which the appeal is prosecuted is not a final order. Under the authorities, the filing of appellees' printed statement, brief and argument is equivalent to a joinder in error and by joining in error appellees waived the right to move to dismiss the appeal. Finlen v. Foster, 211 Ill. App. 609 and cases there cited.

On November 25, 1935 this case was reached upon the call of the docket and submitted upon printed statements, briefs and arguments of the respective parties and taken under advisement by the court and assigned to the writer of this opinion to prepare an opinion. Thereafter and on December 11, 1935 counsel for appellant filed with the clerk of this court a motion on behalf of his client to amend his brief by inserting at the conclusion of his statement thirteen lines of typewritten matter embracing six separately numbered paragraphs which counsel designates as "Errors relied upon for reversal". In support of this motion, counsel files his affidavit in which he states that the depression has overwhelmed his office with litigation; that the many changes caused by the Civil Practice Act have been burdensome to him as a practicing lawyer and that the Frazier-Lemke

act, together with other changes in the laws of the country, have been enough to make one dizzy; that he did not know until December 2, 1935 that his brief had failed to set forth the errors relied upon for reversal and that he now hastens to present the same as they were inadvertently omitted. Thereupon, counsel for appellees filed in the office of the Clerk of this court their cross-motion to strike the motion of appellant for leave to amend its brief. This motion of appellant to amend his brief has no place in this record. The case had previously been submitted to the court for determination upon written briefs and arguments by the respective parties and these had been considered by the court and the case assigned to one of the members of the court to prepare an opinion in accordance with the views of the court.

Rule nine of this court requires that the printed brief of appellant shall contain among other things the errors relied upon for a reversal of the order, judgment or decree appealed from. This requirement is not met by appellant. In Farmers State Bank of Belvidere v. Meyers, General No. 8055, a case also submitted at the October Term, 1935 of this court, Mr. Justice Huffman, speaking for the court, said: "The present Practice Act in force in this state does not require an assignment of errors. Nor did the Practice Act of 1907 contain any such provision. This was then required by rule 11 of the Supreme Court and by rule 18 of this court. Rule 9 of this court, which was adopted June 25, 1934, and in force at the time of the prosecution of this appeal, provides that the brief of appellant shall contain, 'the errors relied upon for a reversal,' and designates where the same shall appear. Rule 39 of the Supreme Court as adopted at its December term, 1933, contained a like provision, which was amplified by amendment at the June term, 1935, thereof. There is no attempt made by appellant to set out in its brief the errors relied upon for a reversal. Under such circumstances there is nothing presented to this court for review.

Butters v. C.B. & Q. Ry. Co., 154 Ill. App. 273; Frick v. Aurora E. & C. Ry. Co., 154 Ill. App. 276. Errors relied upon for a reversal must be assigned. This is not a mere matter of form to be considered waived if not objected to, but is one of substance. Ditch v. Sennett, 116 Ill. 288; Rosin v. Wilde, 80 Ill. App. 58; Jesse French Piano Co. v. Meehan, 77 Ill. App. 577. Such assignment performs the same function in the court of review as a declaration in the trial court. People v. Bleigh, 302 Ill. 45; Great Northern Refining Co. v. Jeffris Lumber Co. 308 Ill. 347; Case v. Duncan, 260 Ill. 226; Ditch v. Sennett, supra. * * * It has long been the rule that a case submitted to a court of review for final decision without an assignment of errors, will be dismissed. Village of East Peoria v. I. N. & W. Ry. Co., 237 Ill. 93; Aetna Life Ins. Co. v. Sanford, 197 Ill. 310; Murrall v. Amer. Tel. & Tel. Co., 217 Ill. 189; Schaeffer v. Burnett, 217 Ill. 84."

This appeal is therefore dismissed.

APPEAL DISMISSED.

Perkins v. C.B. & Q. Ry. Co., 104 Ill. App. 497; Pratt v. Lawson S. & S. Ry. Co., 144 Ill. App. 178. Errors radical enough to be prejudicial must be analyzed. This is not a mere matter of form to be mechanically waived if not specifically by but is one of substance. Ellis v. Barnett, 110 Ill. App. 1; Smith v. Allen, 88 Ill. App. 49; Jones Through Pines Co. v. Hudson, 77 Ill. App. 277. Some analogous particulars the same tendency is the result of implied as a disposition in the trial court. Smith v. Ball, 87 Ill. 49; Great Northern Railway Co. v. Portal Lumber Co. 201 Ill. 1; Pate v. Thomas, 201 Ill. 209; Ilgen v. Donnell, supra. . . . It has long been the rule that a case submitted on a motion or review for final disposition without an examination of errors, will be dismissed. Village of West Dundee v. C. & G. Ry. Co., 227 Ill. 99; Lake Site Dist. Co. v. Hughes, 247 Ill. 514; Donnell v. Chase, Ind. & Ind. Co., 247 Ill. 129; Schaffner v. Chicago, 217 Ill. 24."

This appeal is therefore dismissed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

No. 8900

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1935.

S. C. Andrus, et al.,
Plaintiffs in error

vs.

Clarence E. Fort, et al.,
Defendants in error

Writ of Error to Circuit Court, Winnebago County.

WOLFE, J.

This suit was brought by S. C. Andrus and his wife, Edna H. Andrus, against the Flexotile Floor Company, a corporation, and Clarence E. Fort, Florence M. Fort and Harold S. Fort. Florence M. Fort is the wife of Clarence E. Fort, and Harold S. Fort is their son. The controversy involved in the suit is directly between S. C. Andrus and the Flexotile Floor Company and concerns the alleged ownership by S. C. Andrus and Edna H. Andrus of eighty-five shares of stock of the Flexotile Floor Company. The bill, filed on March 14, 1928, asks for an accounting; also that the action of the directors of the company forfeiting the 85 shares of stock held by Andrus and his wife be declared void; and that the defendants be required to bring into court the records, minute books and books of account of said corporation.

On August 1, 1930, the cause came before the court on the petition of the complainants asking for an order to examine the books of the corporation. The petition was denied. An order was entered stating that it appeared by the answer of the defendants, that they denied the complainants were stockholders of the company, and the question as to whether the complainants were stockholders of the company must be determined prior to the entry of an order for an examination of the books of the company by the complainants. The cause was, therefore, referred to the master in chancery to take evidence and report his conclusions of law and fact upon the sole question as to whether the complainants or either of them were stock-

No. 2000

IN
SUPREME COURT OF FLORIDA
APRIL TERM, 1930

May Term, A. D. 1930.

A. C. Andrus, et al.,
Plaintiffs in error

vs.

Clarence E. Fort, et al.,
Defendants in error

Writ of Error to Orange County, Chancery.

ROSLIN, J.

This suit was brought by A. C. Andrus and his wife, Ethel K. Andrus, against the Florotile Floor Company, a corporation, and Clarence E. Fort, Florence A. Fort and Harold L. Fort. Florence A. Fort is the wife of Clarence E. Fort, and Harold L. Fort is their son. The controversy involved in this suit is directly between A. C. Andrus and the Florotile Floor Company and ownership alleged ownership by A. C. Andrus and Ethel K. Andrus of eighty-five shares of stock of the Florotile Floor Company. The bill, filed on March 14, 1928, sets forth an accounting; also that the action of the directors of the company forfeiting the 85 shares of stock held by Andrus and his wife be declared void; and that the defendants be required to bring into court the records, minute books and books of account of said corporation.

On August 1, 1930, the cause came before the court on the petition of the complainants asking for an order to examine the books of the corporation. The petition was denied. An appeal was entered stating that it appeared by the answer of the defendants, that they denied the complainants were stockholders at the period, and the question as to whether the complainants were stockholders of the company must be determined prior to the right of an order for an examination of the books of the company by the complainants. The court, therefore, interpreted in the order in question, the pleadings and proofs the evidence of law and fact and the only question as to whether the complainants or either of them were stock-

holders of the company. This inquiry involved the questions of fact as to whether the complainants were the bona fide owners of the stock and also whether the directors of the company could legally declare a forfeiture of the stock if not paid for, or if obtained by fraud or chicanery.

The suit is one of those cases where the directors of a corporation, (and the complainant Andrus was one of them) having the greatest confidence in the manager of the company, permitted him to control and manage the affairs of the corporation without any supervision or direction by formal action of the board of directors of the company. When this is permitted for several years as in this case, confusion, uncertainty, charges and counter-charges usually follow. In time it is commonly charged, that there has been a breach or betrayal of confidence, there then results a bitter warfare among the directors, officers and stockholders of the company. If the struggle, or quarrel, reaches the courts, it is not uncommon for much conflicting and contradictory testimony to be introduced. Such cases are very difficult for the courts to decide. So far as possible counsel in this case have very zealously and ably presented the confusing and extensive testimony heard before the master. It is difficult, if not impossible, to fairly discuss this evidence and its bearing on the issues in detail. We have prepared a statement of facts but will not attempt to discuss them all. The complete and accurate index to the abstract of the record, prepared by counsel for the complainants, is worthy of commendation.

In this case we are confronted by about 1,300 pages of conflicting and contradictory testimony taken before the master. The complainant, Andrus, and the defendant, Clarence E. Fort, while the latter was manager and later president of the company, were very good friends. They have had a serious and grievous misunderstanding according to their claims as stated in the bill of complaint and Fort's answer thereto. They are the chief witnesses who testify on the question of the ownership of the shares of stock in dispute. It is conceded by Andrus that the corporation has not been paid in cash for the 85 shares of stock issued to him and to his wife. As a solution of the suit seemed dependent, according to

holders of the company. This inquiry involves questions of fact as to whether the complainants were the bona fide owners of the stock and also whether the directors of the company could legally declare a forfeiture of the stock if not paid for, or if obtained by fraud or concealment.

The suit is one of those cases where the directors of a corporation, [and the complainant Andrews was one of them] having the greatest confidence in the manager of the company, permitted him to control and manage the affairs of the corporation without any supervision or direction by formal action of the board of directors of the company. Then this is permitted for several years as in this case, carried on, unrestriction, charges and counter-charges usually follow. It thus is commonly charged, that there has been a lapse or betrayal of confidence, there then results a bitter warfare among the directors, officers and stockholders of the company. If the struggle, or quarrel, reaches the courts, it is not uncommon for much conflicting and contradictory testimony to be introduced. Such cases are very difficult for the courts to decide. So far as possible counsel in this case have very zealously and ably presented the conflicting and extensive testimony heard before the master. It is difficult, if not impossible, to fully discuss this evidence and its bearing on the issues in detail. We have presented a statement of facts but will not attempt to address them all. The complete and accurate index by the abstract of the record, prepared by counsel for the complainants, is worthy of commendation.

In this case we are confronted by about 1,500 pages of conflicting and contradictory testimony taken before the master. The complainant, ANDREW, and the defendant, Clarence K. Hart, while the latter was manager and later president of the company, were very good friends. They have had a serious and grievous misunderstanding according to their claims as stated in the bill of complaint and Hart's answer thereto. They are the chief witnesses who testify on the question of the ownership of the shares of stock in dispute. It is conceded by Andrews that the corporation has not been paid in cash for the 84 shares of stock issued to him and to his wife. In a solution of the bill answer Hart-ay, [illegible]

the original pleadings, upon a determination of the misunderstanding between Andrus and Fort, the case was heard on the claim of Andrus that he had not agreed to pay for the stock in cash and the denial of this claim by Fort's letters. Promissory notes, checks, corporation tax returns, statements of account, purported records of the corporation and various other exhibits to the number of about 200 were introduced in evidence. The defendant corporation refused to produce its records and books, at the demand of the complainants on the ground that the complainants were not stockholders of the company and were not entitled to see the books and records of the corporation. The defendants introduced in evidence such records of the company as suit their advantage. Letters, documents and minutes of the meetings of the directors of the company were introduced in evidence which bear the signature of Andrus. However, Andrus testified, and it may be truthfully, that he did not read these papers but signed them at the request of Fort in whom he had great confidence and he assumed that they were correct and proper in all respects. He further testified that he gave little attention to the affairs of the company. The original answer of the corporation agreed with the answer of Fort in so far as it alleged that the 85 shares were to be issued to Andrus upon his agreement to pay for them in cash at some definite time upon demand of the corporation, but further alleged that in violation of law and the rights of the corporation, the stock was issued and delivered to Andrus and his wife without being paid for. Nothing was said in the original pleadings about a secret understanding between Andrus and Fort relative to the stock being issued surreptitiously. The master did not pass upon the credibility of the testimony of Andrus and Fort. Basing his findings of facts upon inferences and conclusions which he drew from all the evidence in the case, the master disposed of the case upon a theory different from both claims of Fort and Andrus. Thereupon the defendant corporation amended its answer to conform to the master's findings and conclusions of law. Objections and exceptions to the master's findings were overruled and the Chancellor dismissed the bill for want of equity on December 15, 1933. The record appears here on writ of error obtained by the complainants.

the related pleadings, upon a determination of the misunderstanding between Andrus and Fort, the case was heard on the claim of Andrus that he had not agreed to pay for the stock in cash and the denial of this claim by Fort's letters. Promissory notes, checks, correspondence letters, statements of account, photostatic copies of [illegible] and various other exhibits to the number of about 200 were introduced in evidence. The defendant corporation refused to produce its records and books, at the demand of the complainants on the ground that the complainants were not stockholders of the company and were not entitled to see the books and records of the corporation. The defendants introduced in evidence such records of the company as said [illegible] Lathers, Secretary and minutes of the meetings of the directors of the company were introduced in evidence which bear the signature of Lathers. However, Andrus testified, and it may be true, that he did not read these minutes but signed them at the request of Fort in the great confusion and in reversed that they were correct and proper in all respects. He further testified that he gave little attention to the affairs of the company. The original answer of the corporation agreed with the answer of Fort in so far as it alleged that the 80 shares were to be issued to Andrus upon his agreement to pay for them in cash at some definite time upon demand of the corporation, but further alleged that in violation of law and the rights of the corporation, the stock was issued and delivered to Andrus and his wife without being paid for. Nothing was said in the original pleadings about a secret understanding between Andrus and Fort relative to the stock being issued surreptitiously. The master did not pass upon the credibility of the testimony of Andrus and Fort. Basing his findings of facts upon inferences and conclusions which he drew from all the evidence in the case, the master disposed of the case upon a theory different from both claims of Fort and Andrus. Thereupon the defendant corporation amended its answer to conform to the master's findings and conclusions of law. Objections and exceptions to the master's findings were overruled and the Chancellor dismissed the bill for want of equity on December 15, 1932. The record appears here on writ of error obtained by the complainants.

To understand the anomalous situation presented in the case, it is necessary to refer to the history of the Flexotile Company. The company was incorporated in 1912 with a capital stock of $20,000.00. J. E. Goembel, S. C. Andrus (one of the complainants) and Clarence E. Fort each owned 50 shares, E. W. Goembel 20 shares and L. A. Tice 30 shares. Mr. Tice disposed of his shares several years before this suit was filed and he is not involved therein. Apparently five shares of the Tice's stock are treasury stock or unaccounted for, and 25 shares thereof are owned, or at least controlled by the members of the Fort family. It does appear from Fort's testimony that his son bought five shares of stock held by Tice and paid cash for it; that the son also owns five shares which he purchased from his father, apparently before 1913. Florence M. Fort is the owner of one share of stock of the Company. After the company was incorporated a stockholders' meeting was held and a board of directors was elected. The following officers of the company were elected; J. E. Goembel, President, E. W. Goembel, Vice-President, S. C. Andrus, Treasurer, and Clarence E. Fort, Secretary and Manager. They remained as such officers until about August 24, 1925, when the certificates of stock held by the Goembels and Andrus were deposited with the Manufacturers National Bank of Rockford, endorsed in blank under circumstances which are disputed by Andrus. The company engaged in the business of manufacturing and laying a composition flooring called "Flexotile." The office and place of business were in Rockford.

The Manufacturers National Bank of Rockford held the company's note, dated October 1, 1920, for $5,957.75 payable on demand and endorsed by Clarence E. Fort, S. C. Andrus, John E. Goembel and E. W. Goembel. The indebtedness to the bank was originally for $7,000.00, as evidenced by a note endorsed by the aforesaid stockholders of the company. The note dated October 1, 1920, was a renewal of a note or notes given to secure the debt of $7,000.00, payments having been made on the debt by the company, from time to time. On June 12, 1925, the president of the bank wrote a letter to the company demanding pay-

To understand the arrangement with the property at the case, it is necessary to refer to the history of the Flexotile Company. The company was incorporated in 1912 with a capital account of $50,000.00. J. E. Coombs, S. C. Andrus (one of the complainants) and Clarence E. Ford each owned 30 shares, E. K. Coombs 20 shares and L. A. Tice 20 shares. Mr. Tice disposed of his shares several years before this suit was filed and he is not interested herein. Apparently five shares of the Tice's stock are treasury stock or unaccounted for, and 25 shares thereof are owned, or at least controlled by the members of the Ford family. It does appear from Ford's testimony that his son bought five shares of stock held by Tice and paid cash for it; that the son also owns five shares which he purchased from his father, apparently before 1913. Clarence E. Ford is the owner of one share of stock of the Company. After the company was incorporated a stockholders' meeting was held and a board of directors was elected. The following officers of the company were elected; J. E. Coombs, President, E. K. Coombs, Vice-President, S. C. Andrus, Treasurer, and Clarence E. Ford, Secretary and Manager. They remained as such officers until about August 14, 1922, when the operations of that body by the complaints and others were dissolved with the unfortunate outcome of bankruptcy, endorsed in blank under circumstances which are disputed by Andrus. The company engaged in the business of manufacturing and lay[illegible] asphalt-tion flooring called "Flexotile." The office and place of business were in Rochester.

The Manufacturers National Bank of Rochester held the company's note, dated October 1, 1920, for $5,927.75 payable on demand and endorsed by Clarence E. Ford, S. C. Andrus, John E. Coombs and E. K. Coombs. The indebtedness to the bankers originally for $7,000.00, as evidenced by a note endorsed by the aforesaid stockholders of the company. The note dated October 1, 1920, was a renewal of a note or notes given to secure the sum of $7,000.00, originally loaned and made on the date by the company, for a time to time. On June 1, 1922, the president of the bank wrote a letter to the company demanding pay-

ment on the note. Fort, as manager of the company, replied to this letter to the effect that the note could not be paid except out of the profits accruing to the company and offered to pay the note by installment payments. It is clear from the evidence that the company at that time was insolvent and did not have funds with which to pay the note. The offer of Fort was definitely refused by the bank and its president called Fort's attention to the fact that Andrus and the Goembels were able to pay the note. He stated that the offer of the company was foolish, in view of the financial worth of Andrus and the Goembels and their responsibility as endorsers of the note.

The master found, and his finding is sustained by the testimony of the Goembels, that the Goembels thereupon had an understanding with Fort that if he would secure a release and discharge of their liability as endorsers of the note, they would surrender their stock in the Flexotile Company which would become the property of the company, or in other words, treasury stock. The stock of the Goembels as well as the stock of Andrus, all endorsed in blank, was delivered to the bank. Andrus denies that he surrendered his stock to the bank with any understanding that it was to become treasury stock of the company. It is argued by counsel for Andrus in their reply brief, that he gave his stock to the bank to be used as collateral to secure a loan to pay the note to the bank. In this connection we call attention to the allegations of Andrus's bill of complaint.

"That on or about the 20th day of August, 1925, at which time the said John E. Goembel and the said E. W. Goembel made an agreement with the said Clarence E. Fort that they would surrender all of the stock held by them respectively, to the possession of the Manufacturers National Bank, to be turned over to the said Clarence E. Fort, upon the said Clarence E. Fort procuring the release and discharge of the obligations of the said John E. Goembel and the said E. W. Goembel, and that pursuant to said request the said Clarence E. Fort conferred with your orator, S. C. Andrus, and entered into an agreement with him, whereby the said stock of the said E. W. Goembel and the said John E. Goembel, and the stock owned by your orator, S. C. Andrus, should be

want on the city. Fort, as manager of the company, replied to this letter by the effect that the note could not be paid except out of the profits accruing to the company and offered to pay the note by installment payments. It is clear from the evidence that the company at that time was insolvent and did not have funds with which to pay the note. The offer of Fort was definitely refused by the bank and the president called Fort's attention to the fact that Andrus and the Goembels were able to pay the note. He stated that the offer of the company was foolish, in view of the financial worth of Andrus and the Goembels and their responsibility as endorsers of the note.

The master found, and the finding is sustained by the testimony of the Goembels, that the Goembels thereupon had a conference with Fort that if he would assume a release and discharge of their liability as endorsers of the note, they would surrender their stock in the Flexotile Company which would become the property of the company, or in other words, treasury stock. The stock of the Goembels as well as the stock of Andrus, all endorsed in blank, was delivered to the bank. Andrus denies that he surrendered his stock to the bank with any understanding that it was to become treasury stock of the company. It is argued by counsel for Andrus in their reply brief, that he gave his stock to the bank to be used as collateral to secure a loan to pay the note to the bank. In this connection we call attention to the allegations of Andrus's bill of complaint.

"That on or about the 20th day of March, 1920, at which time the said John L. Goembel and the said R. G. Crockett made an agreement with the said Clarence E. Fort that they would surrender all of the stock held by them respectively, in the capacity of the incorporators National Bank, to be turned over to the said Clarence E. Fort, upon the said Clarence E. Fort assuming the release and discharge of the obligations of the said John L. Goembel and the said R. G. Crockett, and that pursuant to said agreement the said C. E. Fort delivered with your orator, R. G. Andrus, and secured into an agreement with him, whereby the said stock of the said J. L. Goembel and the said John E. Goembel, and the stock owned by your orator, R. G. Andrus, should be

surrendered, and that there should be issued by said corporation to your Orator, S. C. Andrus, eighty-five (85) shares of the said stock, and a like number of shares to the said Clarence E. Fort, fully paid and nonassessable, in further consideration that your orator should loan his personal credit to the said Clarence E. Fort and the said Flexotile Floor Company in procuring material and credit for and on behalf of the said Flexotile Floor Company and on behalf of the said Clarence E. Fort; and that your orator, S. C. Andrus, did thereafter, from time to time, personally guarantee the payment for materials furnished to the said corporation and to the said Clarence E. Fort, in the conduct of said business.

"Your Orator, S. C. Andrus, further represents that at the time of the turning over of said stock by the said John F. Goembel and the said E. W. Goembel, the said John F. Goembel and E. W. Goembel resigned as such directors, and thereafter ceased to be connected in any way with the said corporation."

"Your orator, S. C. Andrus, further represents that as a result of said agreement and understanding, there was issued to your orator, S. C. Andrus, eighty-four (84) shares of said capital stock, and to your oratrix, Edna H. Andrus one share of said capital stock, which certificates were dated August 20, 1925, and your orator, upon recollection, information, and belief, states that thirty-five (35) shares additional capital stock, representing the balance of the capital stock so surrendered, was issued by the said corporation to the said Clarence E. Fort, on or about said August 20, 1925."

"Your orator, S. C. Andrus, further represents that during the year 1926 the said Clarence E. Fort paid to your orator, S. C. Andrus, in various payments, the sum of Two Thousand Six Hundred Seventy-five Dollars ($2,675.00) and represented to your orator, S. C. Andrus, that said payments represented his share of earnings of said corporation."

It is true that after the Goembels surrendered their stockthey ceased to be connected in any way with the Flexotile Floor Company. It is also true that on August 20, 1925, there was issued by Fort to Andrus eighty-four shares of the capital stock of the company and one

surrendered, and that Your Orator is about to sell warrants to your Orator, . G. Andrus, eighty-five (85) shares of the said stock, and a like number of shares to the said Clarence E. Hoyt, fully paid and nonassessable, in further consideration that your orator shall use personal credit to the said Clarence E. Hoyt and the said Flexotile Floor Company in procuring material and credit for and on behalf of the said Flexotile Floor Company and on behalf of the said Clarence E. Hoyt; and that your orator, . G. Andrus, did thereafter, from time to time, personally guarantee the payment for materials furnished to the said corporation and to the said Clarence E. Hoyt, in the conduct of said business.

"Your Orator, S. G. Andrus, further respects that at the time of the turning over of said stock by the said John . Crawford and the said E. W. Crawford, the said John . Crawford and E. . Crawford resigned as ever directors, and therefrom ceased to be connected in any way with the said corporation."

"Your orator, . G. Andrus, further represents that as a result of said agreement and understanding, there was issued to your orator, . G. Andrus, eighty-four (84) shares of said capital stock, and to your orator, John . Andrus one share of said capital stock, which certificates were dated August 30, 1928, and your orator, upon reasonable information, and belief, states that thirty-five (35) shares additional capital stock, representing the balance of the capital stock so surrendered, was issued by the said corporation to the said Clarence E. Hoyt, on or about said August 30, 1928."

"Your orator, S. G. Andrus, further represents that during the year 1928 the said Flexotile . . . . . , ... , in payment payments, the sum of Two Thousand Six Hundred Twenty-five Dollars ($2,625.00) and represented to your orator, S. G. Andrus, that said person had received his share of earnings of said corporation."

It is true that after the Crawfords surrendered their stock they ceased to be connected in any way with the Flexotile Floor Company. It is also true that on August 30, 1928, there was issued by Hoyt to Andrus eighty-four shares of the capital stock of the company and one

share thereof was issued to his wife, Edna H. Andrus. On the same date thirty-five shares of the stock was issued by Fort to himself. From August 15, 1925, to October 17, 1926, Fort paid to Andrus various sums amounting to $3,400.00, which he represented to Andrus were earnings of the company. Whether such payments were made as dividends of the company or as salary to Andrus as the alleged treasurer of the company does not appear in evidence.

Andrus did not loan his personal credit to Fort or the company in aid of securing the payment of the note held by the bank. Andrus received his 84 shares of stock on August 20, 1925. The note was paid August 11, 1925. If the stock of Andrus was placed in the bank to be used as collateral in securing money with which to pay the note of the bank, it seems strange to us that Andrus should receive 85 shares of stock of the company so soon after the note was paid. It is safe to say that the alleged understanding and agreement between Fort and Andrus was not known to the Goembels. It is plain, that the shares of stock received by Andrus on August 20, 1925, were issued in place of the 50 shares originally owned by him and one-half of the 70 shares formerly owned by the Goembels. Fort, on the same date, issued to himself the other half of the Goembel stock. The evidence of Andrus utterly fails to prove that either before or after he and his wife received the 85 shares, he loaned his personal credit to Fort and the company in procuring material and credit on behalf of the company and Fort as consideration for their receiving the stock, as alleged in the bill of complaint. Andrus did not testify that he placed his stock with the bank to be used as collateral to secure money to pay the note of the bank. As conclusive of the point now under consideration it is sufficient to quote from the testimony given by Andrus on cross-examination as follows: "He (Fort) said to get my stock out of the bank and he would call for it and would turn it into the treasury and when the Goembels surrendered their stock, he would give me one-half of the Goembels's stock and he would see that a new issuance was made out giving one-half to me." Thereupon Andrus was further interrogated as follows: Q. What did you pay for this extra 35 shares of stock you

state thereof was issued to his wife, Mrs. Andrus. On the same date fifty-five shares of the stock was issued by Fort to himself. On August 15, 1925, to October 17, 1928, Fort paid to Andrus various sums amounting to $2,400.00, which he represented to Andrus were earnings of the company. Whether such payments were made as dividends of the company or as salary to Andrus as the alleged treasurer of the company does not appear in evidence.

Andrus did not loan his personal credit to Fort or the company in aid of securing the payment of the note held by the bank. Andrus received his 24 shares of stock on August 30, 1928. The note was paid August 11, 1928. If the stock of Andrus was placed in the bank to be used as collateral in securing money with which to pay the note of the bank, it seems strange to us that Andrus should receive 55 shares of stock of the company so soon after the note was paid. It is safe to say that the alleged understanding and agreement between Fort and Andrus was not known to the Goembels. It is plain, that the shares of stock received by Andrus on August 30, 1928, were issued in place of the 30 shares originally owned by him and one-half of the 73 shares formerly owned by the Goembels. Fort, on the same date, issued to himself the other half of the Goembel stock. The evidence of Andrus utterly fails to prove that either before or after he and his wife received the 55 shares, he loaned his personal credit to Fort and the company in procuring material and credit on behalf of the company and Fort as consideration for their receiving the stock, as alleged in the bill of complaint. Andrus did not testify that he placed his stock with the bank to be used as collateral to secure money to pay the note of the bank. As a conclusive of the point we under consideration it is sufficient to quote from the testimony given by Andrus on cross-examination as follows: "He (Fort) said that my stock was at the bank and he would call for it and would turn it into the treasury and then the Goembels surrendered their stock, he would give me one-half of the Goembels's stock and he would see that a new issuance was made out giving me half it was." Thereafter Andrus was further interrogated as follows: Q. What did you pay for this extra 55 shares of stock?

claim you got? A. I didn't pay anything. Q. What did you agree to pay? A. Nothing. Q. What consideration do you claim you gave the company for the 35 shares, or one-half of what the Goembels had previously owned? A. My financial standing. Q. What did that have to do with it? A. I am sure I do not know.

The circumstances surrounding the issuance of the 85 shares of stock, in spite of the voluminous testimony taken before the master, in our opinion are not fully disclosed by the direct evidence in the record. The testimony on this point is murky and the master did not err in drawing inferences and conclusions from the whole evidence in the case. The question is then presented whether the master's conclusions and inferences are fair, natural and legitimate.

It does appear from the evidence, that after the stock of the Goembels and Andrus had been deposited with the Manufacturers Bank of Rockford, Fort wrote a letter on July 22, 1925, to one Robert I. Wishnick of New York City. Mr. Wishnick was connected with the Wishnick-Tumpeer Chemical Company from which the Flexotile Floor Company had purchased merchandise and to whom it was indebted to the amount of $2,000.00, or more for unpaid merchandise. It seems Wishnick was well disposed toward Fort and the Flexotile Floor Company and he apparently thought that the Flexotile Floor Company had good business prospects if given financial assistance. He was not pressing the company for the payment of its debts to his company. Fort's letter to Wishnick stated the financial condition of the Flexotile Floor Company and also informed Wishnick that the bank was demanding payment of the note for $5,957.75, and the Goembels and Andrus wanted the note paid without paying it out of their own pockets and that they were willing to turn their stock over to the person paying the note if they could get their names off the note. In this letter Fort stated, "We owe you $2,000.00. If I could get $3,000.00 more from you, and at the same time let the present account run along, I could handle the matter within the next three or four weeks. If you will let me have the additional $3,000.00, I will give you a Company note, endorsed by myself and Mrs. Fort, also put up the controlling 120 shares of stock

data you get? A. I didn't get anything. Q. Did you leave
it out? A. Nothing. Q. Did Washburn at any time ever
ask money for the 50 shares, or one-half of what the Gambels
had previously owned? A. Of Flexwell stock. Q. What did that
have to do with it? A. I am sure I do not know.

The circumstances surrounding the issuance of the 50 shares of stock, in spite of the voluminous testimony taken before the master, in our opinion are not fully disclosed by the direct evidence in the record. The testimony on this point is murky and the master did not err in drawing inferences and conclusions from the whole evidence in the case. The question is then presented whether the master's conclusions and inferences are fair, natural and legitimate.

It does appear from the evidence, that after the right of the Gambels and Ingrams had been deposited with the manufacturers Bank of Hartford, Fort wrote a letter on July 27, 1926, to one Robert L. Wishnick of New York City. Mr. Wishnick was connected with the Wishnick-Tumpeer Chemical Company from which the Flexwell Floor Company had purchased merchandise and to whom it was indebted to the amount of $2,000.00, or more for unpaid merchandise. It seems Wishnick was well disposed toward Fort and the Flexwell Floor Company and he apparently thought that the Flexwell Floor Company had good business prospects if given financial assistance. He was not pressing the company for the payment of its debts to his company. Fort's letter to Wishnick stated the financial condition of the Flexwell Floor Company and also informed Wishnick that the bank was demanding payment of the note for $5,957.70, and the Gambels and Ingrams wanted the note paid without paying it out of their own pockets and that they were willing to turn their stock over to the person paying the note if they could get their names off the note. In this letter Fort stated, "We owe you $2,000.00. If I could put $5,000.00 more from you, and at the same time let the present account run along, I could handle the matter within the next two or four weeks. If you will let me have the additional $5,000.00, I will give you a Company note, endorsed by myself and Mrs. Fort, also put up the 50 shares 100 shares of stock

as collateral. I will include in the note the amount of our present indebtedness to you. Mrs. Fort, as you know, will some day, in the very near future, be perfectly good for the amount, and I could clear the whole thing up in a ~~the~~ mighty few months myself, if I could get into position to take some of the big work that we have a chance to figure."

"Now about repaying you the $5,000.00. I would like to pay it by having you add 20% to the price of the materials we buy from you, and I will pay for the materials--sight draft vs. B. L. Such an arrangement would make it an inducement for all of us to have the purchases large, and I am sure we could work it out before very long.

Now about our other indebtedness:--I have some back salary coming, but I will agree not to draw on it until I get you cleaned up, and I will agree not to draw over $45.00 per week until you are all paid up. I cannot live on less than that.

The blocks of Stock of the three men mentioned are now assigned in blank and in the hands of Mrs. M. F. Thompson of the Manufacturers National Bank of this City, to be delivered to the person paying the endorsed note, and if you can find it possible to help me out, I will handle the matter with Mr. Thompson as you may direct."

Wishnick replied to Fort's letter and as a result of their correspondence, Wishnick sent Fort on August 1, 1925, a draft or check which Fort testified was for $3,000.00. In his letter to Fort, Wishnick stated, "Please let me have your demand note to cover the entire $5,000.00, signed by yourself and Mrs. Fort, and drawing 6% interest." It does not appear in evidence whether the demand note as requested by Wishnick was executed. Mrs. Clarence E. Fort, from her own funds, on July 24, 1925, paid $1,500.00, on the note held by the bank against the Flexotile Floor Company. During the hearing before the master there was introduced a statement, dated August 13, 1925, from Wishnick-Tumpeer Chemical Company to the Flexotile Floor Company showing a balance of $4,644.39. On August 19, 1925, Fort executed six promissory notes for various amounts totalling $3,600.00 and which were signed, Flexotile Floor Company, C. E. Fort, Secretary-Manager C. E. Fort." These notes were paid by checks between October 14, 1925,

as collateral. I will include in the note the records of our account
indebtedness to you. Mr. Hart, as you know, will come day,at the very
near future, be perfectly good for the amount, and I could give the
whole thing up if\#\- it\#\- not for Hartle myself, if I could get into
position to take some of the big work that is here a chance to figure."

"How about repaying you the $5,000.00. I would like to pay it
by having you add 20% to the price of one wheelbarrow so how from you,
and I will pay for the wheelbarrow--sight draft we. T. L. Hart or
arrangement would make it an inducement for all of us to have the
processes large, and I am sure we could work it out before very long.

How about our other indebtedness:--I have some back salary coming,
but I will agree not to draw on it until I get you closed up, and I
will agree not to draw over $50.00 per week until you are all paid up.
I cannot live on less than that.

The blocks of stock of the three iron mines we are now matured
in blank and in the hands of Mr. . T. Thomson of the Manufacturers
National Bank of this City, to be delivered to the owners upon the
endorsed note, and if you can find it possible to pain me out, I will
handle the matter with Mr. Thomson as you may direct."

Hamlin replied to Hart's letter and in a result of their
correspondence, Hamlin sent Hart on August 1, 1890, a check in
each which Hart testified was for $5,000.00. In the letter to Hart,
Hamlin stated, "Please let me have your receipt note to cover the
entire $5,000.00, signed by yourself in Mr. Hart, and drawn by
interest." It does not appear in evidence whether the demand note is
requested by Hamlin was received. Mr. [illegible]
one Canda, on July 24, 1893, paid $1,500.00, on the note held by the
bank against the Plankville Mine Company. During the working period
the market there was introduced a statement, dated June 1, 1893,
from Hamlin-Tanner Mineral Company, to the Plankville Mine Company
showing a balance of $4,[illegible]. On August 10, 1893, [illegible]
six promissory notes for various amounts totalling $5,800.00 and which
were signed, Plankville Mine Company, T. L. Hart, President,
C. H. Hart." These notes were paid by checks between October 14, 1896,

and March 31, 1926. The checks were signed, "Flexotile Floor Company C. E. Fort, Secretary & General Manager C. S. Andrus, Treasurer." The election, or purported election of S. C. Andrus as treasurer of the company, will hereafter appear.

There is some indefinite testimony by Andrus that at one time he guaranteed the checking account of the company, but it is not contended that his money paid the aforesaid notes. We do not know where the money came from to pay the notes. Fort by some means paid the note held by the bank on August 11, 1925. Wishnick did not ask for or receive the shares of stock of the Goembels and Andrus which were left with the bank, but upon payment of the note the stockwas given to Fort by the president of the bank. The president of the bank died before the testimony was taken.

Fort attached the certificates of stock standing in the names of the Goembels and Andrus to the stubs in the stock certificate book of the company. As before stated, the Goembels admit that their stock, if the note held by the bank was paid as above narrated, would become treasury stock of the company. Andrus testified that he knew before the note was paid that the Goembels were going to put their stock up at the bank and that they were going to surrender it to the company if Fort could get them off the note, but he denied ever having any part in the agreement of the Goembels to turn in their stock or in doing anything with reference to the Goembels retiring from the company. After Andrus made this denial in his testimony, Fort introduced in evidence a letter (written on Andrus's typewriter so Fort testified) dated July 25, 1925. The letter is signed by the Goembels and Andrus. Andrus could not deny his signature to the letter, but he stated that he was not familiar with the contents of the letter, when he signed it. This letter is addressed to C. E. Fort, Secretary & Manager and states in part as follows: "In connection with the program which anticipates the retirement of the undersigned from the Flexotile organization,--we feel that a written word of explanation is due you. As you know we are all professional men, and are all very busy in our respective lines of work.

and dated 8/, 1888. The minutes were signed, "Alexander Clark Secretary U. S. Port, Secretary & General Manager O. S. Andrews, Treasurer." The election, or purported election of A. O. Andrews as treasurer of the company, will hereafter appear.

There is some indefinite testimony by Andrews that at one time he questioned the checking account of the company, but it is not evidenced that his money paid the unnecessary notes. He do not know where the money came from to pay the notes. Port by some means paid the note held by the bank on August 11, 1888. Andrews did not ask for or receive the return of which of the Donnells are Andrews which were left with the bank, but upon request of the note the checkers given to Port by the president of the bank. The checkers on the bank died before the testimony was taken.

Port attached the certificates of stock standing in the names of the Donnells and Andrews to the suits in the state certificate book of the company. As before stated, the Donnells admit that their stock, if the note held by the bank was paid as above recited, would become treasury stock of the company. Andrews testified that he knew before the note was paid that the Donnells were going to put their stock up at the bank and that they were going to surrender it to the company if Port could get them off the note, but he denied ever bargaining any part in the agreement of the Donnells to turn in their stock or in doing anything with reference to the Donnells retaining that the company. After Andrews made this denial in his testimony, Port introduced an evidence a letter (written in Andrews's typewriter by Port testified) dated July 25, 1888. The letter is signed by the Donnells and Andrews. Andrews could not deny his signature to the letter, but he stated that he was not familiar with the contents of the letter, when he signed it. This letter is addressed to O. S. Port, Secretary & Manager and states in part as follows: "In connection with the program which outlines the settlement of the unfortunate case the Treasurer requesting, we, the undersigned stockholders, ask that the stock certificates of the company be cancelled and issued in lieu of the old ones, as is due you. As you know we are all professional men, and are all very busy in our respective lines of work.

Thirteen years ago we went into Flexotile with confidence that it was the best flooring material on the market, and we are still of that opinion, as no contradictory evidence has ever come to us. We went into the Flexotile business with the thought that we had a competent manager in the person of yourself, and certainly that thought has been confirmed--continuously and to date.

We fully appreciate and believe your explanations that you need more capital, and that you need the close cooperation of an active directorate that can meet at frequent intervals and study the problems of this merchandising enterprise,-- and right there is where we recognize our incompetency and the fallacy of our trying to handicap you longer, because we simply cannot attend weekly or even monthly directors' meetings, nor extend what would be considered competent counsel, if we did.

We are confident that you can make an immediate and continued success of the business, providing you can secure associates who are familiar with merchandising effort, and it is our idea that we are doing you a real favor in withdrawing from your directorate and your list of stockholders.

You may feel free to refer to any of us in connection with any negotiations that you may inaugurate with prospective purchasers of stock, and we will gladly confirm the statements which we make in this letter." Fort testified that he showed the letter to Wishnick in Chicago before the completion of the negotiations with Wishnick for the money to pay the note at the bank.

This letter of July 25, 1925, was written after Fort had written his first letter to Wishnick asking for a loan of $5,000.00, but before Fort had received any reply to his letter. It was written the day after Mrs. Fort had paid $1,500.00, on the note held by the bank against the company and endorsed by the Goembels and Andrus. Andrus denied that he knew that Fort had written to Wishnick or that he knew that Mrs. Fort had paid $1,500.00, on the note at the time he signed the letter dated July 25, 1925, and which bears his signature. Fort testified that he showed Andrus a carbon copy of his first letter to

Fourteen years ago we went into flexotile with confidence that it was the best flooring material on the market, and we are still of that opinion, as no contradictory evidence has ever come to us. We went into the flexotile business with the thought that we had a competent manager in the person of yourself, who certainly has brought us been confidence--continuously and it does.

We fully appreciate and believe from conversation that you need more capital, and that you need the close cooperation of an active directorate that can meet at frequent intervals and study the problems of this merchandising enterprise,-- and right there is where we recognize our inexperience and the failure of our firm to handicap you longer, because we simply cannot attend weekly or even monthly directors' meeting, nor extend that kind of considered competent counsel, if we did.

We are confident that you can make an immediate and continued success of the business, providing you can secure associates who are familiar with merchandising effort, and it is our hope that we are doing you a real favor in eliminating from your directorate and your list of stockholders.

You may feel free to refer to any of us in connection with any negotiations that you may transpire with prospective purchaser of stock, and we will gladly confirm the statements made to you in this letter." Fort hesitated but he scanned the letter to Blankenship for Chicago before the association of the negotiations with Blankenship for the money to pay the note at the bank.

This letter of July 20, 1949, was written after Mrs had written his first letter to Blankenship asking for a loan of $3,000.00, but Fortune Fort had received only reply to his letter. It was written the day after Mrs. Fort had paid $1,500.00, on the note held by the bank against the company and endorsed by the Goldwins and Mrs. Mrs denied that he knew that Fort had written to Blankenship, or that he knew that Mrs. Fort had paid $1,500.00, on the note at the time he signed the letter dated July 20, 1949, and which bears his signature. Fort testified that he showed Mrs the carbon copy of his first letter to

Wishnick, shortly after it was written.

The master found that Robert I. Wishnick, E. W. Goembel and John E. Goembel acted in good faith in their dealings and transactions with reference to the above matters. The Chancellor did not err in sustaining this finding of the master.

Andrus received the 85 shares of stock on August 20, 1925, placed the certificates therefor in the envelope which he had given to Fort containing his certificate for his 50 shares. He marked out the figure and words '50 shares' on the envelope and wrote in place thereof '85 shares Flexotile Floor Company.' There was introduced in evidence the minutes of a meeting of the stockholders of the Flexotile Company, on August 20, 1925, signed by C. E. Fort, S. C. Andrus and H. S. Fort which is as follows: "At a meeting of the Stockholders of the Flexotile Floor Company, held at the office of the Company, 719 Race Street, Rockford, Illinois on Thursday August 20th, 1925, the following stockholders were present, or represented by proxy; Doctor S. C. Andrus, owning eighty-four shares, C. E. Fort, owning one hundred and four shares, H. S. Fort, owning five shares, Edna H. Andrus, represented by Doctor S. C. Andrus, owning one share, Florence M. Fort, Sr., represented by C. E. Fort, owning one share. Total stock represented at the meeting 195 shares.

C. E. Fort took the chair and announced the purpose of the meeting was to elect three directors to fill out the unexpired terms of Ludwig A. Tice, John E. Goembel and Doctor E. W. Goembel each of whom had disposed of his stock holdings in the Flexotile Floor Company, and retired as a director of the company.

Motion was made by Doctor S. C. Andrus, and seconded by C. E. Fort, that Florence M.Fort, Sr., be elected a director of the Company to fill the place vacated by Ludwig A. Tice. Motion carried. Motion was made by Doctor S. C. Andrus, and seconded by H. S. Fort, that Edna H. Andrus be elected a director of the Company to fill the place vacated by Doctor E. W. Goembel. Motion carried. Motion was made by Doctor S. C. Andrus, and seconded by C. E. Fort, that H. S. Fort be elected

Wisnicki, shortly after it was written.

The master found that Robert E. Wisnicki, i. M. Goembel and John E. Goembel acted in good faith in their dealings and transactions with reference to the above matter. The Committee did not so. in mentioning this finding of the master.

Andrus received the 55 shares of stock on August 4, 1945, signed the certificates therefor in the envelope which he had given to Ford accompanying his certificate for his 50 shares. He marked on the figure and words '50 shares' on the outside and left in place thereof '55 shares Flexible Floor Company.' There was introduced in evidence the minutes of a meeting of the stockholders of the Flexible Company, on August 30, 1945, signed by D. E. Ford, G. G. Andrus and E. E. Ford which is as follows: 'At a meeting of the stockholders of the Flexible Floor Company, held at the office of the Company, 711 Lake Street, Rockford, Illinois on Thursday, August 30th, 1945, the following stockholders were present, or represented by proxy: Robert E. E. Wisnicki, owning eighty-four shares, G. E. Ford, owning one hundred and fifty shares, E. E. Ford, owning five shares, Glen E. Andrus, represented by Proxy E. G. Andrus, owning one share, Florence E. Ford, not represented by G. E. Ford, owning one share. Total stock represented at the meeting 195 shares.

E. E. Ford took the chair and announced the purpose of the meeting was to elect three directors to fill out the unexpired terms of Ludwig L. Tice, John E. Goembel and Doctor E. E. Goembel each of whom had disposed of his stock holdings in the Flexible Floor Company, and resigned as a director of the Company.

Motion was made by Doctor G. G. Andrus, and seconded by E. E. Ford, that Florence E.Ford, be elected a director of the Company to fill the place vacated by Ludwig L. Tice. Ballot carried. Motion was made by Doctor G. G. Andrus, and seconded by E. E. Ford, that Glen E. Andrus be elected a director of the Company to fill the place vacated by Doctor E. E. Goembel. Ballot carried. Motion was made by Doctor E. E. Andrus, and seconded by G. E. Ford, that E. E. Ford be elected

a director of the Company to fill the place vacated by John E. Goembel. Motion carried. There being no other business to come before the Stockholders, it was moved by H. S. Fort and seconded by Doctor S. C. Andrus, that the meeting adjourn. Motion carried. Four copies of these minutes O.K'd and signed, this 20th day of August, 1925, by C.E. Fort, Director, S.C. Andrus, Director H.S. Fort, Director."

S. C. Andrus testified with reference to these minutes: "I signed that because it was sent to my office to sign. I thinkMr. Fort brought it over at the time. I didn't read it. I don't know what is in it. I did not attend any meeting of the stockholders of the Flexotile Floor Company at the office, 719 Race Street, Thursday August 20, 1925, and I didn't know anything about it until this was brought to me (on the hearing) and all that I know is what I now see."

There was introduced in evidence the minutes of a meeting of the directors of the company held on August 20, 1925, which is as follows: "At a meeting of the Directors of the Flexotile Floor Company held at the office of the company 719 Race Street, Rockford, Illinois, on Thursday, August 20, 1925, the following Directors were present or represented by proxy: Doctor S. C. Andrus; Edna H. Andrus, represented by Doctor S. C. Andrus; H. S. Fort; C. R. Fort; Florence M. Fort, Sr., represented by C. E. Fort. C. E. Fort took the chair and announced the purpose of meeting was to elect a President of the Company, to fill the unexpired term of John E. Goembel, retired. Also to elect a First Vice President to fill the unexpired term of Doctor E. W. Goembel, retired. Motion was made by H. S. Fort, and seconded by C. E. Fort that Doctor S. C. Andrus be elected to the office of First Vice President, to serve in this capacity in addition to his present office of Treasurer. Motion carried. Motion was made by Doctor S. C. Andrus, and seconded by H. S. Fort, that C. E. Fort be elected to the office of President of the Company. Motion carried. Motion was made by Doctor S. C. Andrus, and seconded by C. E. Fort, that H. S. Fort be elected to the office of Secretary of the Company. Motion carried. There being no further business to come before the Directors of the Company,

a director of the Company to fill the place vacated by John S. Bowdoin. Motion carried. There being no other business to come before the stockholders, it was moved by E. E. Fort and seconded by Doctor S. C. Andrews, that the meeting adjourn. Motion carried.

Four copies of these minutes C.M.A and signed, this 8th day of August, 1933, by J.E. Fort, Secretary, J.C. Andrews, Director, C.C. Fort, President.

C. C. Andrews testified with reference to these minutes: "I signed that because it was sent to my office to sign. I didn't read it. Fort brought it over at the time. I didn't read it. I don't know what is in it. I did not attend any meeting of the stockholders of the Flemotile Floor Company at the office, Tifton Ga., Thursday August 24, 1933, and I didn't know anything about it until this was brought to me (on the hearing) and all that I know is what I am told."

There was introduced in evidence the minutes of a meeting of the directors of the company held on August 30, 1933, which is as follows: "At a meeting of the Directors of the Flemotile Floor Company held at the office of the company, 711 Ross Street, Tomlinson, Illinois, on Thursday, August 30, 1933, the following directors were present or represented by proxy: Doctor S. C. Andrews; John H. Bowdoin, represented by Doctor S. C. Andrews; E. E. Fort; Florence M. Fort, Sr., represented by E. E. Fort. E. E. Fort took the chair and announced the purpose of meeting was to elect a President of the Company, to fill the unexpired term of John S. Bowdoin, resigned. Also to elect a First Vice President to fill the unexpired term of Doctor S. C. Bowdoin, resigned. Motion was made by E. E. Fort, and seconded by C. E. Fort that Doctor S. C. Andrews be elected to the office of First Vice President, to serve in this capacity in addition to his present office of Treasurer. Motion carried. Motion was made by Doctor S. C. Andrews, and seconded by E. E. Fort, that C. E. Fort be elected to the office of President of the Company. Motion carried. Motion was made by Doctor S. C. Andrews, and seconded by C. E. Fort, that E. E. Fort be elected to the office of Secretary of the Company. Motion carried. There being no further business to come before the directors of the Company,

it was moved by Doctor S. C. Andrus, and seconded by H. S. Fort, that the meeting adjourn. Four copies of these minutes O.K'd and signed this 20th day of August, 1925. C. E. Fort, President, S.C. Andrus, First Vice President and Treasurer, H. S. Fort, Secretary."

Andrus denied Fort's testimony in that he attended the director's meeting of August 20, 1925. After that date he acted as treasurer of the company and Fort sent to him $50.00 per week from December 12, 1925, as his salary for that office. Andrus signed checks and other documents as treasurer of the company. Some of these documents were of grave importance and fraught with somber consequences if not true.

Andrus testified that he gave his certificate for his original 50 shares of stock to Fort in July, 1925. It is beyond dispute that the certificate was deposited with the Manufacturers National Bank of Rockford. The receipts issued by the bankto the Goembels for their shares of stock deposited with the bankread substantially as follows: Rockford, Illinois, July 24, 1925, received of ___ Goembel certificate of stock No. __ for __ shares of capital stock of Flexotile Floor Company tobe surrendered to C. E. Fort upon payment of Notes signed by E. W. and J. E. Goembel, Doctor S. C. Andrus and C. E. Fort $5,957.95 & Int. The receipt of the bank for the Andrus certificate does not appear in evidence.

The master found that negotiations resulted in an arrangement by which S. C. Andrus, J.E. Goembel and E.W. Goembel were to deposit their certificates of capital stock for 120 shares with the Manufacturers National Bank to be turned in to the treasury of the corporation on the payment of the note in question to the Manufacturers National Bank. The Chancellor did not err in sustaining this finding of fact of the master.

It may be that Andrus did not attend the stockholders' and the directors' meetings held on August 20, 1925. To ask this court to believe that Andrus did not know about these meetings, and about

It was moved by member G. G. Andrus, and seconded by T. G. Dorr, THAT the meeting adjourn. Four copies of the minutes [illegible] were signed this 20th day of August, 1920. G. G. Dorr, President, G.G. Andrus, First Vice President, [illegible], Secretary.

Andrus denied Dorr's testimony in that he attended the directors' meeting of August 20, 1920. [illegible] stated he gave the treasurer of the company and left work to his duties as his work from March 12, 1918, on his orders for that office. Andrus signed checks and other documents in behalf of the company. Some of these documents [illegible] every [illegible] was [illegible] without consequences if not true.

Andrus testified that he gave his certificates for his original 12 shares of stock to Dorr in July, 1918. It is agreed disputed that the certificate was deposited with the [illegible] National Bank of Rockford. The present issued by the bank to Dorrbola for their shares of stock formerly with the National substantially as follows: Rockford, Illinois, July 22, 1918, received of ___ Certificate of stock to. __ for __ shares of capital stock of Flexible Floor Company take assignment to G. L. Dorr [illegible] ment of Notes signed by R. W. [illegible] R. G. [illegible], [illegible] and G. E. Dorr $2,987.05 a list. [illegible] the note for the Andrus certificate does not appear in evidence.

The master found that Andrus signed in an affidavit by which G. G. Andrus, J.E. Dorr and L.E. Dorr have to deposit their certificates of capital stock for 120 shares with the Rockford National Bank to be turned in to the treasurer of the corporation on the payment of the note in question to the Rockford National Bank.

The Chancellor did not err in overruling the motion for [illegible] of the master.

It may be that Andrus did not intend the [illegible] at the directors' meeting held on August 20, 1920. To the main court he believes that Andrus did not know about these meetings, and about

the meeting of the directors held December 7, 1925, when his salary was raised from $25.00 a weekto $50.00 a week, is expecting this court to believe too much. In addition to what has been said, there was introduced in evidence some interesting letters from Fort to Andrus and which, in our opinion, are subject to interpretation in the light of acts and transactions which had taken place before the letters were written.

On October 22, 1926, Fort wrote to Andrus (Andrus got the letter--as he admits, page 226 of abstract) as follows: "I am attaching a statement re: Your original investment in Capital Stock of this Company showing interest returns which you have had, and indicating a total of $153.68 above 6% compound.

I have considered the payment of this interest return as one of the heaviest moral obligations that I had shouldered, and am naturally pleased to have completed it. I have set aside every other ambition and desire except the payment of real and pressing obligations in order to bring this about at this date. I have borrowed money at the Rockford National Bank, etc. We have two notes running to Wishnick-Tumpeer, totalling $1,372.71, and becoming due November 21, and December 21, etc. The last 60 days have been one of the quietest in years. etc., * As you know, we buy our materials from hand to mouth, at broken package prices and pay L.C.L. Freight rates on them, etc.,* I am absolutely certain that you will agree with me that we should not pay dividends until they can be paid from actual surplus, and I am equally certain that our Bankers or any business man would concur with us in this belief. I would like to pay you 6% per annum return on your present $8,500.00, holdings,--paying it semi-annually, even though there might have to be some sacrifices along other lines to do that, and I believe you will be glad to cooperate with me by accepting that as satisfactory until we are really out of the woods and on a solid footing.

I also attach a statement of the moneys I have drawn from the business, and as compared with the salary accrued on the $60.00,

per week basis, at which we started. It is natural for you to wonder how I existed during the particularly lean periods, and it is right that it should be explained to you. I had $5,000.00, received for my equity in the Coal Business also $4,000.00,received, etc.,* Whenever conditions seem to warrant, I should like to have my salary accrue more rapidly than at the present rate of $60.00, per week. etc., The above is all by way of preface to a heart to heart talk which I am hopeful of having with you at a very early date."

Inclosed with the letter was a paper headed: "Statement of interest accrued and of Cash returns to Hector S. C. Andrus from Flexotile Floor Company." The statement recites as follows: "Investment $5,000.00, made approximately July 1, 1912, 21% was returned during the first year in six dividends beginning with one of 4% on December 14, 1912, followed by 3 of 3% each and one of 5%." The dividends referred to were not made from the profits of the company, but were made in depletion of its capital stock. The statement, after making the above quoted recital continues:

"The above returns left a net investment on Jan. 14 1914, 6% interest from Jan. 14, 1914, to Jan. 14, 1915, on $3,950.00 ----------	$3,950.00 237.00
	$4,187.00

Thereafter the statement tabulates the interest on "total investment" for each year from Jan.14, 1915 to October 17, 1926, according to rests when payments of various amounts totalling $3,400.00, were made by the company to Andrus. As a result of the calculation, the statement shows a summary as follows:

"Original investment --------- ----------	$5,000.00
Present investment ----------	4,846.32
Gain over 6% Compound Interest Return ----------	$ 153.68

Plus release from obligation on Company notes.
Present stock holdings $8,500.00, a gain of 70% in Stock."

There was also inclosed with the letter dated October 22, 1926, a detailed statement of amounts accruing and drawn by Fort as his salary as manager of the Company since April 26, 1916, to October 17, 1926, and showing balance due Fort of $4,874.46.

per week basis, as which we started. It is learned for you to
wonder how I existed during the constitutionally low periods, but
it is right that it should be considered to you. I was [illegible],
treated for my sanity in the real [illegible] [illegible],000.00,
medical, etc.," However our finances soon I manage.
Also to have my salary raised more regularly than at the present
rate of $50.00, per week. etc.. The above is all by way of pre-
face to a brief to ensure talk which I am [illegible] [illegible]
you at a very early date."

Enclosed with the letter was a copy header: "Statement of
Internal Revenue and of Cash receipts to Mrs. [illegible]
Marcella Floor Company." The statement read as follows: "In-
vestment $5,000.00, made approximately July 1, 1929, and was
received during the first year in six dividends beginning at the
of 45 to December 14, 1932, followed by [illegible] and one of $3."
The dividends referred to were not made from the profits of the
company, but were made in duplication of the original stock. The
statement, after making the above quoted [illegible] [illegible]:

"The above returns left a net loss [illegible] [illegible] $[illegible]
[illegible], of interest from Jan. 1, 1934. to Jan. 14, [illegible]
[illegible], or $[illegible] ---------- $[illegible]
$[illegible]

Thereafter the statement continued [illegible] "total investment"
for each year from Jan.14, 1933 to October 1, 1935, [illegible]
ing to [illegible] when payments of [illegible] [illegible] $[illegible],
were made by the company to [illegible]. [illegible] [illegible] [illegible],
the statement ends a summary as follows:

"Original investment ---------- $[illegible]
Present investment ---------- [illegible]
Gain over $5 Original Interest Later ---------- [illegible]
Also please from which [illegible] [illegible] Jerry [illegible].
Present stock holdings $[illegible],000.00, [illegible] of 70% [illegible] [illegible]."

There was also included with the letter dated October 1,
1935, a detailed statement of income [illegible] and [illegible] that
as his salary to account of the [illegible] [illegible] 10, 1932,
to October 17, 1935, and showing income due [illegible] of $[illegible].

As a summary of the salary statement we find thereon the following:

"6% compound interest return on Fort's stock from date of organization to October 17, 1926, being the same amount as paid to Doctor Andrus ---- $3,400.00

Total due C. E. Fort, October 17, 1926 ----------$8,335.46."

Before the above letter and its contents were received by Andrus, Fort had written to Andrus, on December 9, 1925, as follows: "Dear Doctor: In face of the fact that your humble servant is to be away tomorrow, Thursday and, therefore, unable to make personal report of 'doings' I am writing this to say that the Rike-Kumler Contract arrived this a.m.--INTACT, and signed. I am attaching copy of minutes of the meeting which you attended on the 7th. I could not resist also attaching your salary check for the current week, although I took the precaution of dating it the 12th., because we must guard against our people securing their salary funds before they are due.

How do you suppose our erstwhile president would like to fondle a weekly slip like that on his _____ desk _____

The change was not the result of any 'typical' impulse, but of concentrated thought, plus recent developments and prospects, and it really comes easier than the original start of the '$25.00.' More strength to us. More health--more careful care from Rockford's DeLuxe and 100%--Plus diagnostitian, more money for the splendid sport who carried through years and years and years without a sign of discouragement or fading of wonderful friendship, or confidence. Maybe we're rough necks, but we have good memories. More to come. "WATCH 'EM GROW."

The copy of the minutes of the meeting of the directors of the company referred to in the letter of December 9, 1925, show that a motion was passed that the salary of Doctor S. C. Andrus be advanced from $25.00 to $50.00, per week, beginning with the week ending December 12, 1925. The fact that Andrus did not attend this meeting of the directors of the company is one of the facts

as a summary of the salary increases as this letter has prejudiced:

"All compound interest return on Port's stock from date of organization to October 17, 1926, being the same amount as paid to Porter Lumber ---- $4,400.00

Total due C. E. Port, October 17, 1926 ----------$8,888.44."

Before the above letter and its contents were received by Lumber, Port had written to Andrus, on December 9, 1926, as follows:

"Dear Doctor: In face of the fact that your humble servant is to be very lonesome, Thursday and, therefore, unable to make personal report of 'doings' I am writing this to say that the mile-limber Cadillac arrived this a.m.--I TOT, and signed. I am attaching copy of minutes of the meeting which you attended on the 7th. I could not resist also attaching your salary check for the current week, although I took the precaution of dating it the 14th., because we must guard against our people accepting their salary raise before they are due.

How do you suppose our erstwhile president would like to receive a weekly slip like that on his _____ desk _____

The change was not the result of any 'physical' impulse, but of concentrated thought, plus recent developments and process, and it really comes easier than the original start of the 'Lus.Co.' More strength to us. More health--more natural sure from Hamilton's Deluxe and 100%--Pure disposition, more money for the Lumbid sport who started through (illegible) of discouragement or feeling of wasteful friendship, or confidence. Maybe we're rough rocks, but we have good memories. More to come. "SAYER 'EM GROW."

The copy of the minutes of the meeting of the directors of the company referred to in the letter of December 9, 1926, show that a motion was passed that the salary of Doctor C. E. Andrus be advanced from $30.00 to $50.00, per week, beginning with the week ending December 14, 1926. The fact that Andrus did not attend this meeting of the directors of the company is one of the note

of this tangled web of seeming intrigue which we have taken into consideration in interpreting the letter sent to Andrus by Fort on October 22, 1926.

Fort testified that when the 85 shares of stock were issued to Andrus and his wife, Andrus said, "Any time you need the money, just let me know, I can get it. I had several conversations with Andrus about paying for the 85 shares of stock, but I don't recall them all except one in October 1926, I recall that. The substance of them all was the same--you know me. Whenever you get where you have to have the money, I will raise it some way. The conversation I speak of in October, 1926, was in Doctor Andrus's office. I told him the building we are occupying is not safe to carry the loads we have put in it; that the lease was soon to expire." Harold Ford, son of C. E. Fort, also testified that Andrus stated that he would pay for the 85 shares of stock.

Andrus denies in toto the testimony of Fort and his son. He testified that he was on a foreign trip or journey in October, 1926. Fort also testified that he had conversations with Andrus in August, 1925. Andrus proved that he was not in Rockford at that time and that he did not see Fort on those days. The Goembels also by their testimony directly contradicted Fort's testimony that he had talked to them at certain places and times about surrendering their stock. They also denied the substance of those alleged conversations.

Some time in January, 1927, Fort sent out circular letters soliciting subscriptions for preferred stock in the Flexotile Floor Company. One of these letters was received by Andrus. Andrus showed the letter to his attorneys, who wrote to Fort demanding that he desist from sanding the letters and stating they were in violation of the Illinois "Blue Sky law." Some time after Fort received these letters from Andrus attorneys, he, according to his testimony, went to the office of Andrus and demanded of him that he pay $8,500.00, for the 85 shares of stock which he received on August 20, 1925. This Andrus refused to do. He testified that Fort said,

activity involved work of a very intricate nature and are very exacting. In interpreting the letter sent to Judge by Fort on October 31, 1922.

Fort testified that when the 85 shares of stock were issued to Andrus and his wife, Andrus said, "Why then you need the money, just let me have, I can get it. I had several conversations with Andrus about paying for the 85 shares of stock, but I don't recall when all except one in October 1920, I recall that. The substance of them all was the same--you know me. Whenever you get ready you need to have the money, I will pledge it some day. The conversation I speak of in October, 1920, was in Doctor Andrus's office. I told him the building we are occupying is not safe to carry the loans we have put in it; that the loans was soon to mature." Joseph Ward, son of G. W. Fort, also testified that Andrus stated that he would pay for the 85 shares of stock.

Andrus denies in toto the testimony of Fort and his son. He testified that he was on a Jewish trip or journey in Poland, 1922. Fort also testified that in his conversations with Andrus in August, 1922. Andrus proved that he was not in Cleveland at that time and that he did not see Fort on those days. The Goodbels also by their testimony directly contradicted Fort's testimony that he had talked to them at various times and also about [illegible] .

They also denied the existence of these alleged letters.

Some time in January, 1923, Fort sent out circular letters soliciting subscriptions for securities [illegible] Company. One of these letters was received by Andrus. Andrus answered the letter to his attorneys, who wrote to Fort demanding that he desist from sending the letters and stating they were in violation of the Illinois "Blue Sky Law." Some time after Fort received these letters from Andrus attorneys, he, according to his testimony, went to the office of Andrus and demanded of him that he pay $3,800.00, for the 85 shares of stock which he received on August 20, 1922. This Andrus refused to do. He testified that Fort said,

in substance, "I crooked the Goembels and I will crook you too." An assistant in Doctor Andrus's office corroborated him as to this conversation and statement of Fort.

The master found as a fact as follows: "I further find that at the time of the surrender of the stock, a secret arrangement was entered into between C. E. Fort and S. C. Andrus, one of the complainants, and not disclosed to the Corporation or to any of the parties in interest under and by which if the said J. E. Goembel and E. W. Goembel were effectually eliminated and after the money had been secured from Robert I. Wishnickto pay the note at the Manufacturers National Bank, 85 shares of the capital stockmade up of the 50 shares formerly owned by S.C. Andrus and one-half of that formerly owned by J. E. Goembel and E. W. Goembel, were to be issued to S.C. Andrus." The Chancellor did not err in sustaining this finding of fact of the master.

The master further found as a fact, and it is not disputed that it is true, as follows: "I further find that on the 29th day of February, A.D. 1928, a resolution was passed by the Board of Directors of the Flexotile Floor Company calling upon S.C. Andrus and Edna H. Andrus, respectively, to pay for their respective shares of stockwithin five days and in the event of a failure that the issuance of said stock be void and cancelled. I further find that both S.C. Andrus and Edna H. Andrus refused to pay for the stock in question and that after five days the stockwas cancelled on the books of the Corporation."

It should be stated that at the hearing the complainants introduced in evidence in the first instance their certificates of stock for the 85 shares of stock now in question and rested their case on this prima facie showing. The other testimony introduced was in defense of the prima facie case and in rebuttal and surrebuttal and sur-surrebuttal and sur-sur-surrebuttal.

in substance, "I proceed to Cambria and I will crack you too." An assistant in Doctor Andrus's office corroborated him as to this conversation and abandonment of fort.

The master found as a fact as follows: "I further find that at the time of the surrender of the stock, a receipt or vouchers were entered into between G. I. Hart and S. G. Andrus, one of the respondents, and not disclosed to the Corporation or to any of the parties in interest under and by which if the said S. K. Coombel and N. V. Coombel were effectually eliminated and after the money had been secured from Robert K. Hamilton per the note at the Manufacturers National Bank, or shortly a few months thereafter, the 50 shares formerly owned by S.G. Andrus and one-half of that formerly owned by L. E. Coombel and S. K. Coombel, were to be issued to S.G. Andrus." The Commissioner did not err in sustaining this finding of fact of the master.

The master further found as a fact, and it is not disputed that it is true, as follows: "I further find that on the 19th day of February, A.D. 1928, a resolution was passed by the Board of Directors of the Flexolite Floor Company calling upon S.G. Andrus and Edna K. Andrus, respectively, to pay for their respective shares of stock within five days and in the event of a failure that the issuance of said stock be void and cancelled. I further find that both S.G. Andrus and Edna K. Andrus refused to pay for the stock in question and that after five days the shares cancelled on the books of the Corporation."

It should be stated that at the hearing the complainants introduced in evidence in the first instance their certificates of stock for the 25 shares of stock now in question and rested their case on this prima facie showing. The other testimony introduced was in defense of the prima facie case and is rebuttal and surrebuttal and sur-surrebuttal and sur-sur-surrebuttal.

The decree of the court overruled all exceptions to the master report and approved it. The court ordered: "It is further ordered, adjudged and decreed by the court that on the date of the filing of the original bill in this case and at this time the said S. C. Andrus and the said Edna H. Andrus were not in law or in equity stockholders of the said Flexotile Floor Company." This decree was to the effect that said complainants at the time of the filing of the bill were not bona fide owners of the 85 shares of stock in question. We are of the opinion that the decree of the Chancellor should be affirmed and the parties left where the Chancellor found them.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

No. 8960

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1935.

Thomas C. Young, Edna Young,
R. J. Owen and Ellen Owen,
Plaintiffs and Appellees

vs.

Appeal from Circuit Court,
Winnebago County.

Wilbur Laurent,
Defendant and Appellant.

WOLFE, J.

The plaintiffs, Thomas C. Young and Edna Young, R. J. Owen and Ellen Owen filed a suit in the Circuit Court of Winnebago County against Wilbur Laurent, in which they claim they were injured in a collision between an automobile in which they were riding and the automobile of the defendant. The petition consists of eight counts. The first, third, fifth, and seventh counts charge the defendant with the negligent operation of his automobile. The second, fourth, sixth and eighth counts charge the defendant with wilfully, wantonly and maliciously driving his automobile, and by reason thereof the automobiles collided and the plaintiffs were injured. The defendant did not challenge the sufficiency of the allegations of the petition but filed an answer thereto denying that the defendant was negligent or guilty of any wilful and wanton conduct which caused an injury to the plaintiffs. The case was submitted to a jury who found in favor of the plaintiffs, and assessed damages in favor of the plaintiff, Thomas C. Young, in the sum of $5,000.00, and in favor of Edna Young in the sum of $500.00, in favor of R. J. Owen in the sum of $50.00, in favor of Ellen Young in the sum of $500.00. In addition to the formal verdict, a special interrogatory was submitted to the jury which is as follows: "Do you find from a preponderance of the evidence that the defendant, Wilbur Laurent, was guilty of wilful, wanton and malicious conduct?" "Answer: 'Yes,' or 'No.' "The jury answered this interrogatory 'Yes.'

No. 8065

IN THE
SUPREME COURT OF CALIFORNIA
SECOND DISTRICT

October Term, A.D. 1928.

Thomas E. Young, Ethel Young,
E. T. Dean and Allen Dean,
Plaintiffs and Appellants,

vs.

Upham Press District Court,
Lincoln County.

Milton Laurent,
Defendant and Respondent.

Court, J.:

The plaintiffs, Thomas O. Young and Ethel Young, E. T. Dean and Allen Dean filed a suit in the District Court of Lincoln County against Milton Laurent, in which they claim they were injured in a collision between an automobile in which they were riding and the automobile of the defendant. The petition contains of eight counts. The first, third, fifth, and seventh counts charge the defendant with the negligent operation of his automobile. The second, fourth, sixth and eighth counts charge the defendant with wilfully, wantonly and willfully driving his automobile, and by reason thereof the automobiles collided and the plaintiffs were injured. The defendant did not challenge the sufficiency of the allegations of the petition but filed an answer thereto denying that the defendant was negligent or guilty of any wilful and wanton conduct which caused the injury to the plaintiffs, and assessed damages in favor of the plaintiff.

The case was submitted to a jury who found in favor of the plaintiff, Thomas O. Young, in the sum of $5,000.00, and in favor of Ethel Young in the sum of $500.00, in favor of E. T. Dean in the sum of $[illegible].00, in favor of Allen Young in the sum of $500.00. In addition to the general verdict, a special interrogatory was submitted to the jury which is as follows: "Do you find from a preponderance of the evidence that the defendant, Milton Laurent, was guilty of wilful, wanton and malicious conduct?" Answer: 'Yes,' or 'No.' The jury answered this interrogatory 'Yes.'

The defendant entered a motion for a new trial which was overruled. He then entered a motion in arrest of judgment, which was overruled. Judgment was entered on the verdict and the case is brought to this court on appeal.

The defendant insisted in the trial court and also in this court that the evidence does not sustain the finding of the jury, that the defendant was guilty of wilful, wanton and malicious conduct. It is also strenuously insisted by the defendant that the petition filed by the plaintiff is not sufficient in law to sustain a verdict of finding the defendant guilty of wilful, wanton and malicious conduct in driving and operating his automobile. He claims the averments are not positive in that respect. It is further claimed, that four counts in the petition charge the defendant with negligence and in the others, an attempt to charge the defendant with wilful and wanton conduct, and he further claims that the general verdict of guilty, can not be sustained.

The parts of the petition which are questioned in this proceeding are paragraphs five and six of count 2 of the petition, which are as follows: "5. It then and there became and was the duty of the defendant not to so wilfully, wantonly and maliciously drive, manage, operate and control his automobile at the time and place aforesaid as to run into, upon and against the automobile in which the plaintiffs were then and there riding as hereinbefore averred." "6. Wholly regardless of his duty and obligation in this regard aforesaid, the defendant, at the time and place as averred, did so wilfully, wantonly and maliciously drive, manage, operate and control his automobile, with an utter disregard for the safety of the plaintiff, at an unlawful rate of speed, and turned his said automobile directly in front of the plaintiff's automobile, that by and on account of the said wilful, wanton and malicious conduct the defendant drove his automobile into the automobile in which the plaintiffs were then and there riding, as hforeherein averred." The averments of wilful and wanton conduct are the same in each of the second, fourth, sixth, and eighth counts.

The defendant entered a motion for a new trial which was overruled. He then entered a motion in arrest of judgment, which was overruled. Judgment was entered on the verdict and the case is brought to this court on appeal.

The defendant insisted in the trial court and also in this court that the evidence does not support the verdict of the jury, that the defendant was guilty of wilful, wanton and malicious conduct. It is also strenuously insisted by the defendant that the proof offered by the plaintiff is not sufficient in law to support a verdict of finding the defendant guilty of wilful, wanton and malicious conduct in driving and operating his automobile. The claim has assumed a new position in that argument. It is hardly evident, that from counsel's the position change the defendant was negligent and in the alternative, at attempt to charge the defendant with wilful and wanton conduct, and he further claims that the general verdict of guilty, has not the sufficient.

The parts of the petition which are mentioned in this assignment are paragraphs five and six of count [illegible], which are as follows: "5. In that time [illegible] was the duty of the defendant not to be careless, wantonly and maliciously drive, manage, operate and control his automobile in the manner complained of herein, but, upon and against the contrary, [illegible] were then and there wilfully, wantonly and maliciously negligent. 6. Wilfully negligent, if it be law and difficult in this regard [illegible], the defendant, at the time and place aforesaid, did so wilfully, wantonly and maliciously drive, manage, operate and control his automobile, which was after dangerous for the safety of the plaintiff, at a unusual rate of speed, and turned the said automobile directly in front of the plaintiff's automobile, that by reason of the said wilful, wanton and malicious conduct the defendant drove his automobile, into the automobile in which the plaintiff was riding, and thereby injured the plaintiff as aforesaid." The assignments of wilful and wanton conduct are the same in each of the second, fourth, sixth, and eighth counts.

As before stated the defendant did not challenge the sufficiency of these allegations by motion to strike, or otherwise call the attention of the trial court, to them before the case was submitted to the jury, but filed an answer in which he denied the allegations of wilful and wanton conduct of the defendant. The answer is as follows: "For answer to Count 2 of said complaint, defendant re-alleges his answer to Count 1, and denies the allegations contained in paragraph 6 of Count 2 of said complaint, in that he denies that he was guilty of any wilful, wanton or malicious conduct in driving, managing, operating or controlling his said automobile, or that he drove said automobile with utter disregard for the safety of the plaintiffs, or that he drove at an unlawful rate of speed, and denies that he drove his automobile into the automobile in which the plaintiffs were then and there riding in a wilful, wanton and malicious manner, as alleged in said paragraph 6 of Count 2." The answer to the fourth, sixth and eighth counts of the petition is the same as the answer to Count 2.

It is insisted by the appellant that the evidence does not sustain the finding of the jury that the defendant is guilty of wilful, wanton and malicious conduct in the operation of his automobile which caused the injuries to the plaintiffs. This question was submitted to the jury for their determination and they found against the defendant on this issue. From an examination of the evidence we cannot say that the finding of the jury is against the manifest weight of the evidence, so we are not inclined to disturb the verdict because of its being against the manifest weight of the evidence.

The appellant in the first paragraph of his printed argument uses the following language, to-wit: "It is first seriously contended by appellant, whom we will designate as defendant, that the complaint in this case does not charge wilfulness and wantonness; that it merely charges negligence on the part of the defendant. The very essence of the charge of negligence is the failure to

As before stated the defendant did not challenge the sufficiency of those allegations by motion to strike, or otherwise call the attention of the trial court, at that time, to the fact that the case was submitted to the jury, but filed a motion in which he denied the allegations of willful and wanton conduct of the defendant. The answer is as follows: "For answer to count 2 of said complaint, defendant re-alleges the answer to count 1, and denies the allegations contained in paragraph 2 of count 2 of said complaint, in that he denies that he was guilty of any willful, wanton or malicious conduct in driving, managing, operating or controlling his said automobile, or that he drove said automobile, thereby endangered the safety of the plaintiff, or that he drove at an unlawful rate of speed, and denies that he drove the automobile into the automobile in which the plaintiffs were then and there riding in a willful, wanton and malicious manner, as alleged in said paragraph 2 of Count 2." The answer to the fourth, sixth and eighth counts of the petition is the same as the answer to count 1.

It is insisted by the defendant that the evidence does not sustain the finding of the jury that the defendant is guilty of willful, wanton and malicious conduct in the operation of his automobile which caused his injuries to the plaintiffs. This question was submitted to the jury for their determination and they found against the defendant on this issue. From an examination of the evidence we cannot say that the finding of the jury in resolving the conflict weight of the evidence, in no way not justified in finding the verdict because of the being against the manifest weight of the evidence.

The question in the first paragraph of the written argument was his relative language, namely: "It is from undisputed testimony made by appellant, when he will undertake to determine, that the complaint in this case does not charge willful or wanton misconduct; that it merely charges the operation of the automobile.

The very essence of the charge of complained in the failure to

perform a duty. Such is the essence of the purported charge of wilful and wanton conduct in this case. It is very specifically alleged in this case that it was the duty of the defendant not to drive his car wilfully and wantonly, and that he failed in such duty. There is no allegation contained in Counts 2, 4, 6, and 8 of the complaint which in any manner charge the defendant with having knowledge of impending danger, with having knowledge of any dangerous position of the plaintiffs, with having been conscious whatever of any fact which might have put him on notice that any injury or harm would in any manner come to the plaintiffs if he were to continue on in the management of his automobile as he did."

In support of his argument the appellant relies on the case of Bernier v. Illinois Central R. R. Company 296, Ill. 464. On page 470, the Court in its opinion uses the following language: "To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a wilful or wanton act. Whether an act is wilful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of wilfulness or wantonness."

The case of Brown vs. the Illinois Terminal Company, 319, Ill., 326, on page 331, the Court in discussing what is "Wilful and wanton conduct," has this to say: "Courts have recognized the difficulty of accurately stating under what circumstances a defendant may be held guilty of wilful and wanton misconduct in causing an injury. Such conduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Ill-will is not a necessary element

perform a duty. Such is the essence of the purported charge of wilful and wanton conduct in this case. It is very specifically alleged in this case that it was the duty of the defendant not to drive his car wilfully and wantonly, and that he failed in such duty. There is no allegation contained in Counts 2, 4, 6, and 8 of the complaint which in any manner charge the defendant with having knowledge of impending danger, with having knowledge of any dangerous position of the plaintiffs, with having been conscious whatever of any fact which might have put him on notice that any injury or harm would in any manner come to the plaintiffs if he were to continue on in the management of his automobile as he did."

In support of his argument the appellant relies on the case of Bernier v. Illinois Central R. R. Company 296, Ill. 434. On page 470, the Court in its opinion uses the following language: "To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from the knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a wilful or wanton act. Whether or not in wilful or wanton is usually determined upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety or others it will justify the presumption of willfulness or wantonness."

The case of Brown vs. the Illinois Central Company, 321, Ill., 528, on page 531, the Court in discussing what is "wilful and wanton conduct," has this to say: "Courts have recognized the difficulty of accurately stating under what circumstances a defendant may be held guilty of wilful and wanton misconduct in causing an injury. Such conduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Ill-will is not a necessary element

to establish the charge. Plaintiff and defendant had a legal right to pass over the highway crossing, and each was required, in doing so, to observe due regard for the legal right of the other. A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. (Lake Shore and Michigan Southern Railway Co., v. Bodemer, 139 Ill., 596; Heidenreich v. Bremner, 260 id. 439; Illinois Central Railroad Co., v. Leiner, 202 id. 624.) 296-464."

It will be observed from the language used by our Supreme Court in each of these cases that knowledge of an impending danger is not a prerequisite in order for a person to be held liable for his wilful and wanton acts. In the case cited by the appellant, Burns v. the Chicago and Alton Railroad Company, 229 Ill., App. 170, the court held that the declaration in that case did not state a cause of action charging the Railroad Company with wilful and wanton conduct in the operation of their train which caused the injury to the plaintiff. One of the main cases on which the Court relies in the above case is Chicago & E. I. R. Co., v. Hedges, 105 Ind. 398, 7 N. E. 801. However, the same court in a case written by the same judge in a later case, Grinestaff v. N. Y. Central R. R. Co., 253 Ill.,App. 589, 596, when they were then considering, the sufficiency of a declaration, held that according to the Hedges case the declaration did not state a good cause of action, but by the decision of Waldren Express Co. v. Krug, 291, Ill., page 476, the declaration was sufficient in charging a wanton and wilful act. A quotation from the fifth count of the declaration which was under consideration in the Grinestaff case is as follows: "The defendant by its servants wilfully, wantonly and negligently backed and propelled said engine over

to establish the charge. Plaintiff and defendant had a legal right to pass over the highway crossing, and each was required, in doing so, to observe due regard for the legal right of the other. A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. (Lake Shore and Michigan Southern Railway Co., v. Bodemer, 139 Ill., 596; Baltimore v. Pumpsey, 221 id. 454; Illinois Central Railroad Co., v. Jenkins, 124 id. 524.) 255-264."

It will be observed from the language used by our supreme Court in each of these cases that knowledge of an impending danger is not a prerequisite in order for a person to be held liable for the wilful and wanton acts. In the case cited by the appellant, Pierce v. the Chicago and Alton Railroad Company, 179 Ill., 490, 490, the court held that the declaration in that case did not state a cause of action charging the Railroad Company with wilful and wanton conduct in the operation of their train which caused the injury to the plaintiff. One of the main cases on which the Court relies in the above case is Chicago & E. I. R. Co., v. Hedges, 105 Ind. 339, 7 N. E. 831. However, the same court in a case written by the same judge in a later case, Pittsburgh v. M. V. Central R. R. Co., 252 Ill., 289, 296, when they were then considering, the sufficiency of a declaration, held that according to the Hedges case the declaration did not state a good cause of action, but by the decision of Wabash Railway Co. v. Ehrgott, 221 Ill., page 474, the declaration was sufficient in charging a wanton and wilful act. A portion from Mr. Justice Dunn's opinion of the declaration which was under consideration in the Pittsburgh case is as follows: "The defendant by its servants wilfully, wantonly and negligently backed and propelled said engine over

said crossing and in consequence thereof said engine collided with said automobile and thereby he, the plaintiff, was injured,etc.,"

The comment of the court in the Walldren Express Company v. Krug case, (supra) is, "One count of the declaration charged that the defendant failed to stop its automobile when danger was imminent and carelessly, recklessly and wantonly ran it upon and against the plaintiff. If the facts shown by the evidence established the truth of this averment, the contributory negligence of the plaintiff would not relieve the defendant from liability for its wanton negligence."

It is a well established rule of law that a reviewing court after verdict will view the petition in a different light from the trial court when a motion is made to challenge the sufficiency of its averments. In the case of Gerke v. John Fancher, 158, Ill. 375, the Court announced a rule which has been adhered to steadfastly both by the Appellate and Supreme Courts since that decision. The rule is as follows: "Before verdict the intendments are against the pleader, and upon demurrer to a declaraction nothing will suffice, by way of inference or implication, in his favor. But on motion in arrest of judgment--and the same thing is true where the defect is sought to be availed of on error--the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial, and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration may fairly be presumed to have been proved, the judgment will not be arrested.* The rule as laid down by Chitty is, that a verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action, or, stating the rule more fully, the same author says: "Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge

walk crossing and in consequence turned and swerve collided with said automobile and thereby he, the plaintiff, was injured, etc.,"

The comment of the court in the Kilgore matter (supra) v. Ford was, (supra) is, "The court of the Kelly,Kilgore decided that the defendant failed to stop its automobile when danger was imminent and carelessly, recklessly and wantonly ran it upon and against the plaintiff. If the facts shown by the evidence established the truth of this averment, the contributory negligence of the plaintiff would not relieve the defendant from liability for its wanton negligence."

It is a well established rule of law that a peremptory motion after verdict will view the motion in a different light than the trial court when a motion is made to challenge the sufficiency of the averments. In the case of Davis v. Ohio Lumber, 185, Ill. 275, the Court announced a rule which was been adhered to rigidly both by the Appellate and Supreme Courts since that decision. The rule is as follows: "Before verdict the intendments are against the pleader, and upon demurrer to a declaration, nothing will aid it by way of inference or implication, in his favor. But on motion in arrest of judgment--and the same thing is true where the defect is sought to be availed of on error--the court will indulge every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial, and if, from the issue, the fact omitted is fairly inferable from the facts proved in the declaration may fairly be presumed to have been proved, the judgment will not be arrested." The rule is laid down by Chitty is, that a verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action, or stating the rule more fully, the same author says: "Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge

would direct the jury to give or that the jury would have given the verdict, such defect, imperfection or omission is cured by verdict."

It is our conclusion from a review of authorities and examination of the petition in question, that the petition did state a cause of action and did charge the defendant with wilful and wanton conduct, and the same is sufficient to sustain the verdict. The trial court did not err in overruling defendant's motion for a new trial and arrest of judgment.

The judgment of the Circuit Court of Winnebago County is hereby affirmed.

Judgment affirmed.

would divert the jury to give or that the jury would have given the verdict, such defect, imperfection or omission is waived by verdict."

It is our conclusion from a review of authorities and consideration of the petition in question, that the petition did state a cause of action and did charge the defendant with willful and wanton conduct, and the same is sufficient to sustain the verdict. The trial court did err in overruling defendant's motion for a new trial and arrest of judgment.

The judgment of the Circuit Court of Hardeman County, is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 649

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935.

Albert R. Isoz,

Plaintiff-Appellee,

vs.

Motorway Freight Terminal Company, a corporation,

Defendant-Appellant.

Appeal from the Circuit Court of Winnebago County

WOLFE, J.

This suit was an action on the case, growing out of an automobile collision, brought by Alfred R. Isoz, plaintiff, against two defendants, Motorway Freight Terminal Co., a corporation, and J. C. Woldridge.

The complaint in this case consisted of a single count, charging, in substance, that when the collision occurred the plaintiff was driving an automobile in a southerly direction on a cement highway, U. S. No. 51, which runs in a northerly and southerly direction; that the defendant, J. C. Woldridge, was then and there the owner of and driving a motor truck in a northerly direction, and was then and there the agent and servant of the defendant, Motorway Freight Terminal Company and using said truck in the course of his master's business; that the said Woldridge, as the agent and servant of the master, Motorway Freight Terminal Company, drove and operated the truck in a careless and reckless manner and ra into and against the automobile driven by the plaintiff, and injured the plaintiff to his damage in the sum of $35,000.00.

The defendants filed their answer denying that the defendant Woldridge was the servant or agent of the defendant, Motorway Freight Terminal Company and denied the charge of negligence charged against them, and asserted the fact to be that the defendant, Woldridge, was

Nov. 5th, 1924.

In the Circuit Court of Illinois

[illegible]

[illegible]

Albert E. Jahn,

Plaintiff-Appellee,

vs.

Northern Trading Company,
Company, a corporation,

Defendant-Appellant.

[illegible]

MILLER, J.

This suit was in action on the case, brought for an alleged [illegible] collision, between an [illegible] Plaintiff, Jahn's [illegible] Northern Trading Co., a corporation, and A. [illegible] Defendant.

The evidence in this case showed at a jury trial, [illegible] Jan. 1, 1924, that the collision occurred the plaintiff was driving an automobile in a northerly direction [illegible] way, N. on Ill. 83, which made it a northerly and southerly [illegible] that the defendant, A. [illegible], was the driver [illegible] of and driving a motor truck in a northerly direction, and [illegible] and there the north and south of Ill. Highway, Northern [illegible] Company and which had been in the course of its business, [illegible] business, for the said defendant, in the course and [illegible] the [illegible], interurban Trading Company, [illegible] the [illegible] in a collision and received injuries from the [illegible] the automobile. Drawn by the plaintiff, and [illegible] in his behalf [illegible] in the [illegible].

The defendant filed their [illegible] Jan. 1, 1924, [illegible] Plaintiffs was the owner of said [illegible], [illegible] Trading Company and that the driver of said [illegible] time, and counsel the fact as to the [illegible], [illegible], and

the owner of the truck and had contracted with the Motorway Freight Terminal Company to haul freight. The case was submitted to a jury. At the close of the plaintiff's case the defendant, the Motorway Freight Terminal Company made a motion for the plaintiff to elect whether they would proceed against the defendant J. C. Woldridge or against the Motorway Freight Terminal Company. The plaintiff elected to proceed against the Motorway Freight Terminal Company and the suit was dismissed as to the defendant J. C. Woldridge. The jury found the issues in favor of the plaintiff and against the Motorway Freight Terminal Company and assessed the plaintiff's damages at $5,000.00. Judgment was entered on this verdict, to which the defendant excepted and the case is brought to this court on appeal for review. The appellant has assigned numerous errors which it relies upon for a reversal. The main contention in the case is whether the court erred in refusing to hold as a matter of law, that at the time of the injuries to the plaintiff the relationship of master and servant as between Woldridge and the Motorway Freight Terminal Company has been established by the evidence in the case.

The only testimony bearing upon the question as to whether the defendant Woldridge was the agent and servant of the Motorway Freight Terminal Company, or an independent contractor, was the testimony of Mr. Woldridge himself, who was called on behalf of the plaintiff. The evidence as abstracted is as follows; My name is J. C. Woldridge. I live at Aurora, Illinois. On the night of May 24, 1954, I was hauling freight for the Motorway Freight Company. I came from Davenport, Iowa, with that load. I went to Davenport, Iowa, to pick up the load at the Crescent Biscuit Cracker Company at the direction of the Motorway Freight Terminal Company from Rock Island, who is the other defendant in this case. Motorway Freight Terminal made the contract with the Crescent Biscuit Cracker Company to haul these crackers. The Motorway Freight Terminal just haul freight for them. They haul

freight for various concerns. We haul by the tonnage by truck. They have other men employed to do this besides me. I was employed by them to haul these crackers. The Motorway Freight Terminal Company pays me for that. This was a Fruehauff trailer and Chevrolet tractor truck. The trailer is sixteen feet long and about seven and one-half feet wide, measuring outside the trailer body. It was a box body enclosed on all sides, ten feet and two or three inches from the ground up. That night it had about a six and one-half-ton load. The trailer and truck weighed about eighty-five hundred, a total tonnage of around eleven ton, tractor and load. The Motorway Freight Terminal Company told me where to deliver these crackers. I was going to deliver them at Watertown, Wisconsin.

I just signed the freight bills. I owned this truck. They solicited trade for us fellows and they directed us to these various places to get this freight and haul it to various places - - that is, load for load. They paid by weight. I had my truck and got their load and hauled it to their destination and they paid me so much a hundred. I had just a verbal agreement. I hauled freight for other people, too. When they wanted a load hauled I went there and got it and hauled it to where they told me, and they paid me for that particular hauling. I wasn't hired steady by them all the time in all of my work. They was associated with other freight companies, and if where our load terminated they would be associated with another freight company in that vicinity we would go there and pick up another load and bring it back. The other company paid the Motorway and the Motorway would balance with us. My arrangement was on a weight basis of so much a hundred for using my truck to haul their freight.

The association was between the Motorway Freight Terminal and some other freight company where I would pick up another load. When I hauled that load I was paid for it through the Motorway Freight Terminal Company. I was not always paid through them. Sometimes the

company that we hauled for paid as direct. The usual proceeding was through the Motorway Freight Terminal and to me. This merchandise I had on was the personal merchandise of the Crescent Cracker Company, but I was working for the Motorway Freight Terminal Company."

At the close of all the evidence the Motorway Freight Terminal Company made a motion to dismiss the suit as to them, because there was no evidence that Meldridge was the agent of said defendant. The appellant, on its motion for a new trial in the lower court, contended and now insists here that this was a question of law to be decided by the court as the facts are not in dispute. The appellees contend that the facts are in dispute, therefore, it was a question of fact to be submitted to the jury under proper instructions of the court. The facts as stated by Meldridge are nowhere disputed so far as the contract of employment is concerned. It is our opinion that it was a question of law for the court to decide whether Meldridge was a servant of the appellant, or whether he was an independent contractor at the time of the injury to the plaintiff. (Densby v. Bartlett, 318 Ill. 616).

Our Supreme Court has been called upon frequently to decide whether a party is an independent contractor, or whether the relationship of master and servant exists. In the case of Nelson Brothers & Company v. the Industrial Commission, 330 Ill. 27, we quote from the syllabus of the case. "Whether a party working for another is an employee or an independent contractor depends upon the facts of the particular case, but the right to control the manner of doing the work is the principal consideration, and the fact that payment is to be made by the piece or the job or the day or the hour does not necessarily control. An independent contractor is one who undertakes to produce a given result or to do a specific piece of work, furnishing his own assistance and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given him, and who, in respect to details or things not specified, is not subject to the

orders or control of the person for whom he does the work."

Woldridge was employed by the defendant to do a certain job, viz., 'To haul freight from Davenport, Iowa, to Whitewater, Wisconsin, at a given amount per hundred weight. He was to furnish his own assistant and do the work according to his own idea. The only direction which he had from the Motorway Freight Terminal Company was to do the particular job of hauling. The time he was to start, the road that he should travel, the assistance that he might need in his work, and all details of the work in question was left to the discretion of Woldridge, and the appellant had nothing whatsoever to do with the manner in which the work, or the hauling, should be done. The burden of proving that the appellant did have some control or had the right and authority to have discharged Woldridge at any time on the particular trip in question, or of directing the particular route over which the freight was to be hauled, was on the plaintiff and not for the appellant to prove that he did not have such authority.

The appellee relies principally on the cases of Hartley vs. Red Ball Transit Company, 344 Ill. page 534, and Nelson Brothers & Company vs. the Industrial Commission, 330 Ill. 27, as sustaining his contention that Woldridge was the agent and servant of the appellants. An examination of the Red Ball Transit case, discloses that there was a written contract involved and that the relationship of master and servant did exist between the parties. In the Nelson Brothers' case supra, as before quoted, seems to us that the law as stated by the Supreme Court fits the facts and circumstances in this case.

It is our opinion that the undisputed evidence in this case clearly shows that J. C. Woldridge, at the time of the accident in question, was an independent contractor and was not the agent and servant of the Motorway Freight Terminal Company and that the court erred in overruling the Motorway Freight Terminal Company's motion, for a directed

verdict at the close of all the evidence.

The judgment of the Circuit Court of Winnebago County is hereby reversed.

Reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

APPEAL TO THE

APPELLATE COURT

FOR THE SECOND DISTRICT OF THE

STATE OF ILLINOIS

Fay Elston,

Plaintiff and Appellant,

vs.

Chet Bryan,

Defendant and Appellee.

From the City Court of the City of Sterling, Whiteside County, Illinois.

WOLFE, J.

The appellant, Fay Elston sued the appellee, Chet Bryan in a Justice of Peace Court for $53.80, being moneys that she claimed she had advanced to Bryan while she was keeping company with him. They started going together in the early part of 1931 and continued to be friends until some time in the summer of 1932. During that time the plaintiff claims she had advanced to the defendant the sum of $100.75, for different purposes. She has given him credit for $47.25, leaving a balance of $53.80 which she claims is due and owing to her from the defendant. The plaintiff was successful in the Justice's Court. The defendant appealed the case to the City Court of Sterling where it was tried before the Court and without a jury. He found in favor of the defendant and dismissed the case at the plaintiff's costs. From that judgment the cause is brought to this Court for review.

Complaint is made that the Court erred in not admitting in evidence an alleged account book of the plaintiff. The plaintiff was allowed to testify to the different items in the book, using it to refresh her memory. The Court examined the book and said that he did not think it was admissible as evidence. Whether the

Gen. No. [illegible]

IN THE

APPELLATE COURT

FOR THE SECOND DISTRICT OF THE

STATE OF ILLINOIS

Fay Clarke,

Plaintiff and Appellant,

vs.

Glen Bryan,

Defendant and Appellee.

Appeal from
City Court of the City of
Sterling, Whiteside County,
Illinois.

WOLFE, J.

The appellant, Fay Clarke, sued the appellee, Glen Bryan in a Justice of Peace Court for $100.00, being money that she claimed she had advanced to Bryan while she was keeping company with him. They started going together in the early part of 1932 and continued to be friends until some time in the summer of 1935. During that time the plaintiff claims she had advanced to the defendant the sum of $100.75, for different purposes, and had given him credit for $49.86, leaving a balance of $50.89 which she claims is due and owing to her from the defendant. The plaintiff was successful in the Justice's Court. The defendant appealed the case to the City Court of Sterling where it was tried before the Court and without a jury. He found in favor of the defendant and dismissed the case at the plaintiff's costs. From that judgment the cause is brought to this Court for review.

Complaint is made that the Court erred in not admitting in evidence an alleged account book of the plaintiff. The plaintiff was allowed to testify to the different items in the book, using it to refresh her memory. The Court examined the book and held that he did not think it was admissible as evidence. Whether the

Court did or did not err in the admission of this book, the plaintiff was not prejudiced in any manner, as the Court had all the knowledge which the book contained as the plaintiff was allowed to testify as to each item in the book. She stated that she loaned this money to the defendant and named the items and the purposes for which she let him have it. The defendant admits receiving a part of the money but claims he paid back all that he agreed to pay her. The other amounts that are in dispute he denies he received. He claims some of them are voluntary gifts from the plaintiff to him. The Court saw and heard these witnesses upon the witness stand. He was in much better position to weigh the evidence and decide which one was more worthy to credit than a Court of review. We cannot say that the finding of the Court is manifestly against the weight of the evidence, and therefore, the judgment of the trial Court should be affirmed.

The judgment of the City Court of Sterling is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1935

Frank Branson, Administrator
of the Estate of John E.
Branson, deceased,
(Plaintiff) Appellee

vs.

Illinois Central Railroad
Company, a corporation,
(Defendant) Appellant

Appeal from Circuit
Court, Lee County.

WOLFE, J.

Frank Branson as administrator of the estate of John Branson, deceased, filed suit in the Circuit Court of Lee County against the Illinois Central Railroad Company for the wrongful death of John E. Branson, a minor.

The declaration consisted of three counts. The first count alleges that John Branson the deceased exercised due and ordinary care and caution for his own safety while attempting to cross defendant's right of way at Burke's crossing; that it was the duty of the defendant to exercise due care in the use and maintainance of its railroad track and crossing so as to avoid injury to persons lawfully upon the highway and that the defendant disregarded that duty.

The second count alleges that it was the duty of the defendant to keep its crossings and approaches in a safe and proper condition and that, not regarding its duty it wrongfully permitted and suffered the Burke crossing to remain in a bad and unsafe condition.

The third count alleges, in substance, the plaintiff intestate while in the exercise of due and ordinary care for his own safety attempted to cross defendant's right of way at the Burke crossing; that the defendant failed to exercise due care in the operation of its train at the crossing and that the plaintiff intestate was struck by one of the defendant's trains and died as a direct result of injuries so received.

[illegible]

[illegible]

[illegible]

The plaintiff filed a bill of particulars, which is as follows: "In accordance with the request of the defendant, heretofore filed in this cause, the plaintiff states that the defendant was negligent specifically and particularly as follows:

1. The defendant disregarded its duty to exercise and use due care in the use and maintenance of the railroad crossing known and described as "Burke's Crossing," in particular in failing to maintain a smooth and level passageway thereon for pedestrians and more particularly in permitting the existence of a gap of several inches between the inner edge of each steel rail in said crossing and the edge of the board or plank adjacent to said rail, which gap was unnecessary to the operation of trains upon said rails, and which gap was a constant source of danger to pedestrians.

2. The defendant wrongfully and negligently permitted and suffered the crossing of said railroad known as "Burke's Crossing" to remain in a bad and unsafe condition for persons and property to cross over, in particular in failing to maintain a smooth and level passageway thereon for pedestrians and more particularly in permitting the existence of a gap of several inches between the inner edge of each steel rail in said crossing and the edge of the board or plank adjacent to said rail, which gap was unnecessary to the operation of trains upon said rails, and which gap was a constant source of danger to pedestrians."

Later the following additional bill of particulars was filed which is as follows: "Now comes the plaintiff and submits the following particulars to the negligence of the defendant alleged in Count Three of the plaintiff's complaint.

1. The defendant railroad company disregarded its duty to exercise and use due care in the operation of its northbound passenger train No. 130, on June 11, 1934, in that the servants of said company failed to keep a proper lookout for persons lawfully on the public highway at the railroad crossing known as "Burke's Crossing."

2. The defendant failed to use due care in the operation of its northbound passenger train No. 130, on June 11, 1934, at "Burke's Crossing," in failing to stop said train immediately upon seeing or

The plaintiff filed a bill of particulars, which is as follows: "In accordance with the request of the defendant, heretofore filed in this cause, the plaintiff states that the defendant was negligent specifically and particularly as follows:

1. The defendant disregarded its duty to exercise due care in the use and maintenance of the railroad crossing known and described as "Murphy's Crossing," in particular in failing to maintain a smooth and level passageway across the crossings and more particularly in permitting the existence of a gap of unusual depths between the inner edge of each steel rail in said crossing and the edge of the board or plank adjacent to said rail, which gap was unnecessary in the operation of trains upon said rails, and which was and is a constant source of danger to pedestrians.

2. The defendant carelessly and negligently suffered and permitted the crossing of said railroad track and highway to be and remain in a bad and unsafe condition for persons and vehicles to cross over, in particular in failing to maintain a smooth and level passageway thereof for pedestrians and more particularly in permitting the existence of a gap of unusual depth between the inner edge of each steel rail in said crossing and the edge of the board or plank adjacent to said rail, which gap was not necessary to the operation of trains upon said rails, and which gap was a constant source of danger to pedestrians."

Later the plaintiff withdrew that bill of particulars and filed one which is as follows: "In this cause the plaintiff now submits the following particulars in the negligence of the defendant claimed to have been the cause of the plaintiff's accident.

1. The defendant railroad company disregarded its duty to exercise and use due care in the operation of its northbound passenger train No. 150, on June 11, 1931, in that the engineer of said train failed to give a proper warning of its approach to the public highway at the railroad crossing known as "Murphy's Crossing."

2. The defendant railroad company was negligent in the operation of its northbound passenger train No. 150, on June 11, 1931, at "Murphy's Crossing," in failing to stop said train immediately upon seeing

being in a position to see that John E. Branson, deceased, was in a position of peril on said crossing."

To the original and amended petition the defendant filed its answer. The case was submitted to a jury for trial, and at the close of the plaintiff's evidence the defendant interposed a motion for a directed verdict, which was overruled. The defendant at the close of all the evidence renewed its motion for a directed verdict. This motion likewise was overruled. The jury found the issues in favor of the plaintiff and assessed his damages at $2,500.00. The Court entered judgment on the verdict in favor of the plaintiff and against the defendant in the sum of $2,500.00. From this judgment the case is brought to this court on appeal.

The evidence shows that John Branson was a lad about 14 years of age who was killed by a passenger train of the Illinois Central R. R. Company on a public highway crossing, about 6 miles Northwest of Amboy, in Lee County, Illinois. The accident occurred on the 11th day of June, 1934, about 7:00 o'clock p.m. At the place where the accident occurred the crossing is visible from the railroad track for approximately a mile in both directions. On the evening of the accident in question John Branson and another boy, Herbert Schick, left the Branson house together. They started North on the highway towards the crossing which was at a distance of approximately 500 feet. William Branson, a brother of the deceased plaintiff, preceded Herbert Schick and his brother John to his home and had gone in to ask his parent's permission to go to a neighbor's house to see another young man. Herbert Schick testified as to seeing John Branson approach the railroad crossing but did not see the train strike him. According to the testimony the only eye witness of the accident was the deceased's ten year old sister, Adeline Branson, who testified that she was out of doors behind the house emptying soap water. She said she saw her brother John standing on the railroad track "Pulling with his left leg," before she saw the train approaching, which hit her brother.

Frank Branson, the father of John Branson, testified that he went down to the scene of the accident and saw John lying in the field some distance from the railroad track in a mangled condition; that he cut

The plaintiff filed a bill of particulars, which he on follows: "A assessment with the regard of the defendant, therefore filed in this cause, the plaintiff states that the defendant was negligent specifically and particularly in failing:

1. The defendant discovered the duty to remove and was due care in the use and maintenance of the railroad crossing tracks and described as "Florida Avenue," in particular in failing to maintain a safe and level passageway between the rails and some particularly in permitting the existence of a gap of several inches between the inner edge of each rail in said crossing and the edge of the adjacent plank adjacent to said rail, which gap was unnecessary to the operation of trains upon said rails, and which gap was a constant source of danger to pedestrians.

2. The defendant wrongfully and negligently permitted and maintained the crossing of said railroad tracks on "Florida Avenue" in such a bad and unsafe condition for travel and injury to arise thereon, in particular in failing to maintain a smooth and level passageway for pedestrians and were particularly in permitting the existence of a gap of several inches between the inner edge of each rail in said crossing and the edge of the adjacent to said rail, which gap was unnecessary to the operation of trains upon said rails, and which gap was a constant source of danger to pedestrians."

Later the following additional bill of particulars was filed which is as follows: "For cause the plaintiff and amends the following particulars to the complaint of the defendant filed in this action on the plaintiff's behalf:

1. The defendant railroad company discovered its duty to remove and was due care in the condition of its crossing tracks, dated May 20, 1930, on Nov 21, 1931, in that the condition of said crossing failed to have a proper license for crossing tracks in the public highway at the railroad crossing known as "Avery's Crossing."

2. The defendant failed to use due care in the maintenance of the crossing tracks on Nov. 1930, on the 1st 1931, at "Avery's Crossing," in failing to keep said track immediately upon coming to

being in a position to see that John E. Branson, deceased, was in a position of peril on said crossing."

To the original and amended petition the defendant filed its answer. The case was submitted to a jury for trial, and at the close of the plaintiff's evidence the defendant interposed a motion for a directed verdict, which was overruled. The defendant at the close of all the evidence renewed its motion for a directed verdict. This motion likewise was overruled. The jury found the issues in favor of the plaintiff and assessed his damages at $2,500.00. The Court entered judgment on the verdict in favor of the plaintiff and against the defendant in the sum of $2,500.00. From this judgment the case is brought to this court on appeal.

The evidence shows that John Branson was a lad about 14 years of age who was killed by a passenger train of the Illinois Central R. R. Company on a public highway crossing, about 6 miles Northwest of Amboy, in Lee County, Illinois. The accident occurred on the 11th day of June, 1934, about 7:00 o'clock p.m. At the place where the accident occurred the crossing is visible from the railroad track for approximately a mile in both directions. On the evening of the accident in question John Branson and another boy, Herbert Schick, left the Branson house together. They started North on the highway towards the crossing which was at a distance of approximately 500 feet. William Branson, a brother of the deceased plaintiff, preceded Herbert Schick and his brother John to his home and had gone in to ask his parent's permission to go to a neighbor's house to see another young man. Herbert Schick testified as to seeing John Branson approach the railroad crossing but did not see the train strike him. According to the testimony the only eye witness of the accident was the deceased's ten year old sister, Adeline Branson, who testified that she was out of doors behind the house emptying some water. She said she saw her brother John standing on the railroad track "Pulling with his left leg," before she saw the train approaching, which hit her brother.

Frank Branson, the father of John Branson, testified that he went down to the scene of the accident and saw John lying in the field some distance from the railroad track in a mangled condition; that he cut

being in a position to see that this is another, somewhat, was in a position of profit as well as convenience.

In the original six weeks period the intensity first has passed. The case was updated to a jury for trial, in one of the cities of the plaintiff's property for intentional intervened a motion for a directed verdict, which was overruled. The defendant at the close of all the evidence renewed its motion for a directed verdict. This motion likewise was overruled. The jury found for James in favor of the plaintiff and assessed his damages at $[illegible]. The court entered judgment on the verdict in favor of the plaintiff and against the defendant in the sum of $[illegible]. From this judgment the case is brought to this court on appeal.

The evidence shows that John Brown was a bad boy in years of age who was killed by a passenger train of the Illinois Central R. R. Company on a public highway crossing, near a place commonly known as Lee County, Illinois. The evidence received in the trial of the case, shows that the plaintiff's son, if he did, the defendant maintained the crossing in question in the following manner, for the reasons in which the evidence is based on the following and another boy, Robert Jenkins, left the Brown home together. They started north on the Chicago towards the crossing which was at a distance of approximately one mile. Within sight, a portion of the crossing plaintiff, presented Robert Jenkins to the train and the brakes on the train and had gone in to the Lee County's residence to go to a neighbor's house to see a sick person. Robert Jenkins testified as to seeing John Brown approach his residence crossing but did not see the boy's entire body. Jenkins by the testimony in chief was asked of the witness and the defendant's counsel and stated, "Johnny Brown, who testified that he was killed by the train, was on his way home from school." The train was coming in the direction of the witness and the boy's entire body. Jenkins testified that he was in the railroad track "Johnny was on the track." Johnny was on the high crossing, which is the boundary.

Jenkins testified, the fence of John Brown's residence was in such form to the house of the neighbor and was such that a person in the direction from the railroad track to a neighbor's house, that is, the

one of the shoes from John's foot; that he thought at that time that the heel was not on the shoe; that the shoes which John was wearing were old shoes of his (the fathers) and were number seven and one-half; that a few days later he went down to the railroad tracks and in between the rail and the plank on the crossing he found a heel of the shoe which John had worn and took it home with him. He identified the heel as being one from the shoe which John was wearing the day he was killed. The space between the rail and plank where the heel was found in the crossing was three to four inches in width and about 5½ inches deep. There were no angle-irons or guard rails between the track and the plank.

William Branson testified that he was 16 years of age. He related how he and his brother John had been employed that day. After they had done their usual chores they ate supper and went down to the Schick residence. They were going up to the Hanson farm to see a boy named Dunbar. On the way back he stopped and asked his parent's permission if he could go. William also testified that he was present and saw his father cut the shoe off from John's foot; that he got out his knife and cut the shoestrong; and that the heel was off of the shoe at the time his brother John died; that he was present at the railroad tracks when the heel was found and saw it lying in between the track and the plank on the crossing; that the train did not stop after the accident.

Dallas J. McKown, the fireman, and George Fishburn, the engineer, on the engine testified that the bell on the engine was ringing and the whistle blowing as they approached the crossing in question and they estimated the speed of the train between 40 and 45 miles per hour. Each testified that they did not know that an accident occurred or the boy had been killed until they arrived at the next station; that neither of them saw the deceased on the railroad tracks as their train was approaching.

Both appellant and appellee cited numerous cases and made arguments relative to the law applicable to this case. It seems to us that there is very little, if any, question as to the law applicable

one of the young men Jack's crowd, that he brought at first also that the boat was out on the ocean; that the young men were very old whom of his time (Albert) did very tender love and non-duty; that a few days before he went down to the village Wyndo and it between the rail and the shore on the morning he found a boat of the same style, that had oars and boat is some ship bin. He identified the boat as being one from the same time Jack was wearing the day he was killed. The course between the rail and place where the boat was found in the morning had been by four years in view and about 8 miles long. There was no engine- tenan or people rails between the shore and the island.

William Jones on testified that he was 12 years of age. On Wednesday he and the brother John had been walking that day, after they had done their usual morning they are walking out and down to the usual residence. They were going up to the house they to see a day school teacher. On the way that he observed and noted his mother's parents at it in front yo. William also testified that he was present all the time the boat left the shore Jack's front. That he was not his father and the opposite, it was that the boat was off of in more at the time his brother John stay that he was present at the walking towards the and was lost and saw it going in towards the beach and the shore on the morning that the boats did not stay after the accident.

Dalton A. Nelson, the fisher, and George Flaherty, the fisher, on the engine testified that the bill in the engine the engine was the white flowing in they overhauled the morning in Jackson and they estimated the speed of the with between 8 and 10 miles an hour. Both testified that they did not know the accident occurred or the boy had been killed until then. Both believe in the same circumstances of time and the discovery of the accident occurred shortly after was overhauling.

Both engineer and fisher stated that the boat

[illegible] relative to the law-abiding in this case. It seems to be that there is very little, if any, remedy in the law available

to this case, but is purely a question of fact to be submitted to the jury under proper instructions. It is undisputed that John Bramson was struck by a train of the defendant on the crossing where the engineer and fireman had an unobstructed view for practically a mile. If the servants of the defendant in charge of the train did not see the boy, they were guilty of a failure to keep a proper lookout for persons who might be going over the crossing and would be guilty of negligence. While the plaintiff intestate was walking across this railroad track it was his duty to keep a proper lookout for any train that might be approaching; if he failed in that duty and was killed thereby he would be guilty of such contributory negligence that the plaintiff in this case could not recover.

To sustain the verdict of the jury, the testimony of Adeline Bramson, the ten year old sister of the deceased, must be believed. She was corroborated by the father and brother. The shoe on John's foot without a heel and the heel found between the railroad track and plank on the crossing, were facts to be considered by the jury. If this testimony is true, it seems to us they would be justified in believing that John's foot was caught in the crossing; that he could not extricate it, and the engineer and fireman, failing to see him negligently ran their train onto the boy and killed him.

We are aware of some facts in Adeline Bramson's testimony which discredited her statement somewhat, but the jury which heard the case had the benefit of seeing this little girl on the witness stand and observing her actions, and it was their preculiar province to judge the weight they would give to her testimony. They have seen fit to believe her and to render a verdict in favor of the plaintiff. We cannot say that the jury's finding is manifestly against the weight of the evidence.

The judgment of the Circuit Court of Lee County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935

Henry T. Bower,

Appellant,

vs.

The Citizens Insurance Company of New Jersey, a corporation,

Appellee,

Appeal from the Circuit Court of Lake County

WOLFE, J.

Henry T. Bowers started suit against the Citizens Insurance Company of New Jersey in the Circuit Court of Lake County to recover on a policy of insurance covering a dwelling in Waukegan, Illinois, which was destroyed by fire on December 26, 1933. The amended complaint was based upon a standard fire insurance policy. The complaint alleges that the fire occurred December 26, 1933, without fault upon the part of the plaintiff and from none of the causes excepted by the policy; that the plaintiff was not in Waukegan, Illinois, from several weeks prior to December 26, 1933, until August 9, 1934, and that until the latter date he had no knowledge of the fire; that he had a tenant in the premises, a colored person, who was the plaintiff's agent for informing him of any damages to the building or the need of any repairs; that the said tenant was furnished by the plaintiff with stamped envelopes addressed to the plaintiff at his address in Chicago for the tenant's use in communicating with the plaintiff; but that during the fire all of said envelopes were burned and destroyed, and that without them the tenant could not recall the plaintiff's name or address, and as a result thereof did not notify the plaintiff of the fire. The plaintiff further alleges on information and belief that as a matter of fact the defendant, through its claim department had actual notice of the fire on or about December 30, 1933; that

immediately upon learning of the fire on August 9, 1934, plaintiff, on August 11, 1934, gave written notice of it to the defendant; that on August 20, 1934, he gave oral notice to the defendant through one of its agents in Chicago; on September 22, 1934, he again gave written notice and proof of the fire and loss by letter and affidavit in detail as required by the policy. This complaint was sworn to by the plaintiff. A copy of the policy was attached to the petition.

The defendant made a motion for a final judgment upon the amended ~~ment~~ complaint as set forth in the provision of the policy which reads as follows: "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company;" and the further provision of the policy that the insured shall "within 60 days after the fire, * * * render a statement to the company, signed and sworn to by said insured stating the knowledge and belief of the insured as to the time and origin of the fire", etc. The defendant alleges that the facts set forth in the amended complaint did not show a sufficient compliance by the plaintiff with the terms, conditions and requirements of the policy. The plaintiff made motion for judgment on the pleadings in his favor. The trial court entered judgment for the defendant upon the pleadings. The plaintiff elected to stand by his amended complaint and prosecute this appeal.

The appellant concedes that he did not give immediate notice of the fire nor furnish proof of loss within 60 days as required by the terms of the policy. His excuse for not doing so is because he did not live in the City of Waukegan but in the City of Chicago and had no notice whatsoever of the fire until approximately 9 months thereafter. He contends that as soon as he learned of the fire, he gave notice at once to the insurance company and furnished proof of loss as required by the policy. It is the contention of the appellees that the plaintiff was bound by the literal wording of the policy to give notice of the fire immediately thereafter and file his proof of loss within 60 days and that the petition does

not allege facts that would excuse him from giving notice as required by the policy of insurance.

The appellant has cited numerous cases in which the courts of different states and some of this state, have construed policies that have similar wording as the policy in question, and have held that the insured is not bound literally by the term "immediately", but the same should be considered to mean a reasonable time thereafter. The appellee has filed a very, very lengthy brief and argument and cites cases to the contrary. From an examination of the cases which we have reviewed, we are of the opinion that the better interpretation is that contended for by the appellant, namely, "that the word immediately" should be construed, under the circumstances of each particular case, to be a reasonable time, and the insured will not be bound by a strict interpretation of the wording of a policy, but of circumstances.

This court will take judicial notice of the fact that the City of Waukegan is comparatively a short distance from the City of Chicago. The petition alleges that the premises were occupied by a tenant and that he was the agent of the plaintiff to keep him informed about conditions relative to the property. Both parties to this litigation complain about the statements made by the other which are not in the record. The bill charges that the agent of the plaintiff was furnished with self-addressed, stamped envelopes in which he was to send the rent, or communicate with the plaintiff in Chicago. It seems to us that a reasonable man, if not hearing from his tenant within 9 months, would make inquiry to find out the conditions concerning his property. If the rent was paid and the tenant, alleged to be the plaintiff's agent, did not notify his principal of the fire, we think the agent would be at fault and the principal would be bound by his act and would have been deemed to have the same knowledge as the agent regarding the burning of the property. The cases cited by the appellant followed the rule, that, where failure

and signs words that would cause the item giving notice to
required by the notice of interest.

The applicant has also argued that it is not the
of different claims and some of this claim, have mentioned claims
that have similar wording or the policy in question, and that
that the interest is not based directly to the term "reasonably",
but the term should be considered to mean a reasonable time therefore,
the applicant has filed a very, very lengthy brief in support and
also cases to the contrary. From a consideration of the cases cited
we have reviewed, we are of the opinion that the better interpretation
that is that established for the applicant, namely, "that the word
reasonably" should be construed, under the circumstances of each
particular case, to be a reasonable time, and the interest will not
be barred by a strict interpretation of the wording of a policy, but
of circumstances.

This court will i hold Publicit notice of the full this the
life of insurance is accordingly a court interest from the date
of claims. The parties will be the insurance case decided by
a lawyer not take by one the claims of the insurance to have the in-
terest after equitable relief in the property. This decision to
this litigation was into since the statements made by the other side
was not in the record. The bill charges that the lady of the plain-
tiff was furnished with misrepresentations, several occasions in which
he was to sued the year, or commencement with the district in claims.
It seems to be that a reasonable one, if not beyond that the insurance
claim a months, with more liberty in that not to a criticism was-
possible the property. If the year was well and the insure, although
to be the claimant's assert, the lot under the liability of the
city, so that the court would be it that not the relinquish would
be found by his not not would have been found to have the time
insurance or the claim recovering the amount of the property. The
more right of the circuit existing the city, that, when taken

to comply strictly with the policy clauses as to notice and proofs of loss is excusable and the insured has not failed to use due diligence, the courts do not permit the insurance companies to avoid liability. We consider this to be the correct rule to be applied to insurance policies, but in out opinion the insured in this case has not used due diligence in giving notice as required by the policy. No case has been cited in which the court has excused the insured from giving notice, where the facts were so easily ascertained by the insured as in the present case. The petition does not charge that the defendant was sick, away from home, nor disposition of any one, to prevent him from ascertaining the status of his property in 9 months. It was his own agent who was negligent in not notifying him about the fire.

It is our opinion that the trial court properly entered judgment in favor of the defendant. The judgment of the Circuit Court of Lake County is hereby affirmed.

Affirmed.

he would shortly give the matter attention as it being not exactly at home in economics and the Council was not fully of one mind on the subject, the courts do not permit his discretion exercised in good faith. He would not be the usurper who is in control in Government policies, but it is not relative his interest in all cases but not such the difference is given notice as required by the policy. He was his own point in order the point has against the issues from giving notice, where no there was a notice recognized by the Council as in the present case. The petition does not denote that the district was left, only some land, the discretion of our man, to prevent the from constitution the rights of his property in a manner. It was his not ... and the constituent in our authorities his wants the rights.

It is our opinion that the total which remains unpaid in lieu of the 5% tenure. The payment of the overall rent of 1400 pounds is barely sufficient.

(Signed)

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73315—5M—3-32) 7

74 4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1935.

National Bond & Investment
Company, a corporation,
Plaintiff- Appellant,

vs.

Appeal from Circuit
Court, Lake County.

Hobart Scott,
Defendant- Appellee.

William L. O'Connell, as Receiver
of the Highwood State Bank, a
corporation,
Intervenor-Appellee.

WOLFE, J.

This is an action of replevin, for the wrongful taking and detaining of one Hupmobile Eight Sedan which the plaintiff alleges is its property. The suit was filed in the Circuit Court of Lake County. The declaration alleges that the defendants unlawfully took the goods and chattels of the plaintiff, to-wit, one Hupmobile Eight Sedan, and unjustly detained the same. The pleas of the defendant, the Highwood State Bank, allege that it is not guilty of the wrong set forth in the declaration and that the right of property in the car is in the defendant and not the plaintiff. The defendant filed an additional plea in which it alleged that the defendant is not guilty of the wrong as set forth in the declaration and that the property of said car is in itself and not in the plaintiff; that the supposed cause of action accrued to the plaintiff as assignee of one H. F. Hewitt of a certain contract of sale for the automobile sought to be recovered herein, and that in said contract of sale Hobart Scott, one of the defendants, purported to agree to purchase said automobile, but that the said supposed signature of said Hobart Scott upon said contract is a forgery. To this plea the defendant filed a replication and alleged that said automobile is the property of the plaintiff and not of the defendant as in the pleas alleged.

The evidence shows that one H. F. Nevitt was engaged in selling automobiles under the name of Nevitt Motor Sales Company at Highland Park, Illinois. The plaintiff, the National Bond & Investment Company, was engaged in the business of purchasing notes secured by conditional sales contracts or mortgages and other commercial credits and specialized in commercial paper in connection with the retail automobile business. They purchased from Nevitt a promissory note and the conditional sales contract, which on its face shows the sale of the automobile in question to the defendant Hobart Scott.

Hobart Scott was called as a witness by the Court and denied that he executed the conditional sales contract and note. Expert testimony was offered on each side as to the genuineness of Scott's signature to this contract. The plaintiff called one Herbert J. Walter, a handwriting expert, who testified that the signature was genuine and that Hobart Scott had signed the instrument in question. The defendants called three bankers, who testified that they in their business were daily called upon to pass upon the genuineness of signatures, and in their opinion the signatures of Hobart Scott on the note and contract in question were not his true and genuine signatures.

On examination of the conditional sales contract it is disclosed, that Scott's signature to the same purports to be witnessed by L. Painter and G. Amos. Neither H. F. Nevitt, L. Painter nor G. Amos were called as witnesses relative to the execution of this bill of sale or note. The record does not show that they were not available to be called as witnesses.

The evidence discloses that the National Bond & Investment Company, in payment for the note and the conditional sales contract, issued its check dated January 20, 1931, and delivered the same to Nevitt which was cashed by him; that Nevitt transferred his interest in the conditional sales contract by an assignment which was attached to the sales contract, and the promissory note endorsed.

The evidence shows that one C. T. Smith was engaged in selling automobiles under the name of Smith Motor Sales Company at Highland Park, Illinois. The plaintiff, the National Bond & Investment Company, was engaged in the business of purchasing notes secured by conditional sales contracts or mortgages and other commercial credits and specialized in commercial paper in connection with the retail automobile business. They purchased from Smith a promissory note and the conditional sales contract, which on its face shows the sale of the automobile in question to the defendant Robert Smith.

Robert Smith was called as a witness by the Court and denied that he executed the conditional sales contract and note. Much testimony was offered on each side as to the genuineness of Smith's signature to this contract. The plaintiff called one Herbert J. [illegible], a handwriting expert, who testified that the signature was genuine and that Robert Smith had signed the instrument in question. The defendants called three bankers, who testified that they in their business were daily called upon to pass upon the genuineness of signatures, and in their opinion the signature of Robert Smith on the note and contract in question were not his true and genuine signatures.

On examination of the conditional sales contract it is disclosed, that Smith's signature to the sales contract is witnessed by L. Palmer and B. Jones. Neither C. T. Smith, L. Palmer nor B. Jones were called as witnesses relative to the execution of this bill of sale or note. The record does not show that they were not available to be called as witnesses.

The evidence discloses that the National Bond & Investment Company, in payment for the notes and the conditional sales contract, issued its check dated January 17, 1931, and delivered the same to Smith which was cashed by him; that Smith thereafter transferred his interest in the conditional sales contract by an assignment which was attached to the sales contract, and the [illegible].

The claim of the plaintiff is based solely upon this conditional sales contract and its assignment by Nevitt. The good faith of the plaintiff in this transaction is not questioned.

The Highwood State Bank's title to the car is based upon a chattel mortgage and note which was duly, signed, acknowledged and recorded. It is undisputed that there was an unpaid balance due on the note, held by the Highwood State Bank and that the chattel mortgage covered the automobile in question, together with other cars; that it was understood that this car was to be used for showroom purposes only; that some officer of the bank kept a daily watch and check-up to see that this automobile was in the showroom of Nevitt's Motor Sales Company; that no authority was given Nevitt to sell this particular automobile; that on default of Mr. Nevitt, the Highwood State Bank tookpossession of the automobile under and by the authority of their chattel mortgage and held it at the time the replevin suit was started.

The record does not show that the plaintiff, nor any of its agents, ever saw the automobile prior to the time it was replevined from the possession of the Highwood State Bank. No investigation was made to ascertain whether or not Robert Scott had signed the contract. Mr. Scott never had possession of the automobile in question and the same was never removed from the showroom floor until it was taken into possession by the Highwood State Bank. The court heard the case without a jury and found the issues in favor of the defendant, the Highwood State Bank. Judgment was entered on this finding and the case was brought to this Court on appeal.

The Court in his opinion found that Scott's signatures to the note and bill of sale were forgeries. The appellant insists that the court erred in this finding and also in the admission of the evidence of the defendant who testified that these signatures were forgeries. We do not think that the Court erred in the admission of this evidence. It is a question of the weight to be attached to their evidence, and not its admissibility. Each of

The claim of the plaintiff is based solely upon this mortgage notes and the assignment by Hewitt. The good faith of the plaintiff in this transaction is not questioned.

The Glenwood State Bank's title to the car is based upon a chattel mortgage and note given the bank, by Lewis, as indicated and recorded. It is undisputed that there was an unpaid balance due on the note, held by the Glenwood State Bank and that the chattel mortgage covered the automobile in question, together with other cars; that it was understood that this car was to be used for showroom purposes only; that some officer of the bank kept a daily watch and checked to see that the automobile was in the showroom of Hewitt's Motor Sales Company; that no authority was given Hewitt to sell this particular automobile; that on default of Mr. Hewitt, the Glenwood State Bank took possession of the automobile under and by the authority of their chattel mortgage and held it at the time the replevin suit was started.

The record does not show that the plaintiff, nor any of its agents, ever saw the automobile prior to the time it was replevined from the possession of the Glenwood State Bank. No investigation was made to ascertain whether or not Joseph Lewis had signed the contract. Mr. Lewis never had possession of the automobile in question and the same was never removed from the showroom floor until it was taken into possession by the Glenwood State Bank. The court heard the case without a jury and found the issues in favor of the defendants, the Glenwood State Bank. Judgment was entered on this finding and the case was brought to this Court on appeal.

The Court is of the opinion that Hewitt's endorsement of the note and bill of sale was fraudulent. The appellant contends that the court erred in this finding and that in the admission of the evidence of the defendant and in finding that these documents were forgeries. We do not think that the court erred in the admission of this evidence. It is a question of [illegible] to be attached to their evidence, and the credibility, [illegible]

them testified as to their experience in the comparison of handwriting. The trial Court saw these witnesses, heard them testify and it was his province to weigh their testimony and give it credence as he thought was justifiable. He has seen fit to give more weight to these three men than he did to the expert called on behalf of the plaintiff. From a consideration of all the evidence in the case we are of the opinion that the greater weight of the evidence sustains the findings of the trial Court that Hobart Scott's signatures to these instruments are forgeries.

Before the plaintiff would be entitled to recover in this case it must show by a preponderance of the evidence that it has a right to the immediate possession of this automobile. Its whole case must stand or fall on the validity of the bill of sale for this automobile. If the bill of sale is a forgery it cannot convey any title or right to the plaintiff. In an action of replevin, the plaintiff must recover on the strength of his own title and not on the weakness or lack of title, or right of possession in the defendant. The signature of Hobart Scott on the bill of sale being a forgery, it is our opinion that the plaintiff cannot recover in this case.

The plaintiff's second assignment of error is that the bank is estopped to assert its lien by its course of conduct in allowing the automobile in controversy to be placed on the sales floor of a known retail dealer for exhibition to the public. The third is, that the plaintiff is an innocent party to the transaction with H. F. Hevitt and therefore is entitled to invoke the rule of estoppel against the defendant. The same questions were raised in the case of Forgan vs. Gordon Motor Finance Company 350, Illinois, 449. The Court held adversely to the contention now advanced by the appellants. Aside from the element of forgery in the present case, the facts in the Forgan case are very similar, so nearly so that if the names of the parties involved were changed a statement of facts in the case would be applicable to either case. The law as

stated by the Court in the Forgan case applies to all of the disputed questions in the present case. A part of the opinion is as follows: "It is urged, however, as an exception to the rule of law above stated, that the Gordon Company, by its conduct in allowing the Woodlawn Motors to retain possession of the automobile, is now precluded from denying the seller's authority to sell, under the doctrine that where one of two innocent persons must suffer, he should bear the burden whose conduct has induced the loss. But that rule does not apply in this case. The Credit Trust did not purchase the automobile in question. All it purchased was the conditional sales contract executed by the Woodlawn Motors and Allison. Before purchasing this contract the Credit Trust officers and agents had never seen the automobile therein described. The right of an innocent purchaser who buys an article on display in the ordinary course of business is not in issue, as the res purchased was not the automobile but a conditional sales contract. It was the financial condition of the purchaser, Allison, which was the subject of investigation by the Credit Trust prior to its purchase rather than the automobile itself. The record shows that no representative of the Credit Trust saw the automobile in the salesroom or gave any concern as to its whereabouts at the time the Allison contract was purchased. On the other hand, the record shows that the Gordon Company kept an almost daily check-up on the whereabouts of the automobile. The Gordon Company furnished the money with which the Woodlawn Motors purchased the automobile and its contract was in every respect a bona fide transaction, followed by adequate measures to protect its investment. In contrast with this, the Credit Trust was negligent in relying upon a mere statement that the automobile was a demonstrator in Allison's possession without confirming this fact by investigation."

It is our conclusion that the evidence in this case shows that the chattel mortgage held by the Highwood State Bank was a bona fide transaction and a valid and existing mortgage and the condition

[illegible]

of the mortgage being broken and the bank having taken possession of the automobile it then obtained good title to the automobile and as against the plaintiff, was entitled to the possession of the same.

The appellees in their printed brief filed an additional abstract and cross-errors. The appellant filed a motion to strike the appellee's additional abstract of record, brief and argument. The appellees filed objections to the motion and asked the Court not to consider the cross-errors. The motion to strike ~~ix~~ and objections were taken with the case. The motion to strike the appellee's brief and additional abstract from the files is hereby overruled. We have not considered the cross-errors assigned by the appellee, as it was not necessary for a proper adjudication of the rights of the parties in this case.

The judgment of the Circuit Court of Lake County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

75 4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9010 28

In the Appellate Court of Illinois

Second District

October Term, A. D. 1928.

H. F. Sarvis and A. S. Stone,
partners doing business as
Sarvis-Stone Transfer Company,

Plaintiffs-Appellees,

vs.

Howard Geiger,
Defendant-Appellant.

Appeal from the Circuit Court

of La Salle County

WOLFE, J.

This action was brought to the Circuit Court of La Salle County by the appellees, H. F. Sarvis and A. S. Stone, partners doing business as the Sarvis-Stone Transfer Company, against the appellant, Howard Geiger, to recover damages suffered by the plaintiffs from a collision between a truck and trailer driven by an employee of the appellee and an automobile of the appellant, driven by himself.

The declaration consists of three counts. After proper allegations of ownership of the motor truck and the trailer, and the automobile of the defendant, the petition further alleges that the plaintiffs and their agent were in the exercise of due and ordinary care for the safety of their truck and trailer, and then charge that through negligence the defendant ran his automobile into the truck and trailer, and the trailer of the plaintiff was damaged.

The defendant filed his answer denying that the accident was caused by his negligence. He also filed a cross-complaint, in which he alleges that the accident in question was caused by the negligence of the plaintiff, and that his automobile was destroyed. He asked judgment against the plaintiff for $400.00, the amount of the damage sustained by him. After the cause was called for trial and the impanneling of the jury commenced the plaintiffs were allowed to amend their petition by changing the name of the plaintiff from a corporation to partners. Over the objections of the defendant they were also

[illegible]

In the Appellate Court of Illinois

[illegible] District

[illegible] Term, A. D. 1909.

[illegible]

W. F. Davis and A. A. [illegible],
partners doing business as
Davis-[illegible] Theater Company,

Plaintiffs-Appellees,

vs.

[illegible] Jeiger,

Defendant-Appellant.

[illegible] from the Circuit Court
of La Salle County

[illegible]

Opinion.

This action was brought in the Circuit Court of La Salle County by the appellees, W. F. Davis and A. A. [illegible], partners doing business as the Davis-[illegible] Theater Company, against the appellant, [illegible] Jeiger, to recover damages suffered by the plaintiffs from a collision between a train and trailer driven by an employee of the appellee and an automobile of the appellant, driven by himself.

The declaration consists of three counts. After [illegible] plea of contributory negligence on the motor truck and the trailer, and the negligence of the defendant, the pleadings further allege that the plaintiffs and their agent were in the exercise of due and ordinary care for the safety of their person and property, and that the action that through negligence the defendant pushed his automobile into the plaintiffs' car and trailer, and the injury of the plaintiffs was brought.

The defendant filed his answer denying that the plaintiffs were damaged by his negligence. He also filed a [illegible], in which he alleges that the complaint is insufficient to recover by the negligence of the plaintiff, and that the defendants are [illegible]. The court judgment against the plaintiff for [illegible], the amount of the damage sustained by him. After the court had ruled on the motion and the [illegible] pleadings of the jury concerning the liability were filed by the their petition by finding the [illegible] of the defendant from a motor-bike to pedestrian. Over the objections of the defendant they were also

allowed to amend their complaint by alleging, "The plaintiffs were deprived of the use of said tractor and trailer for a long period of time, to wit, two weeks, and said tractor and said trailer were then and there permanently injured, so they could not be repaired, and the value of said tractor and said trailer were thereby depreciated in value in a large sum, to wit, Five Hundred Dollars, ($500.00)".

The answer of the defendant was ordered to stand to the amendment of the complaint.

After these amendments the defendant moved for a continuance, because new elements of damage had been alleged which the defendant could not then prepare to meet as the case was already on trial. The court overruled the motion for continuance. The case was tried before a jury, who rendered a verdict in favor of the plaintiff in the sum of $950.00. From this judgment this appeal has been taken.

It is insisted by the defendant that the court erred in allowing the plaintiff to amend their petition, and then overruling the defendant's motion for a continuance. Our new practice act provides that either party may amend their pleadings any time before judgment is finally entered upon the verdict, such amendment to be on such terms as the trial court may deem equitable. The court did not err in allowing the amendment. Rule 7, paragraph 4 of our Practice Act provides as follows: "No amendment shall be cause for continuance, unless the party affected thereby, or his agent or attorney, shall make affidavit that in consequence thereof, he is unprepared to proceed to or with the trial of said cause. And if the cause thereof is the want of material evidence, such a continuance shall be granted only on such further showing as may be required for a continuance for that cause. If the cause thereof is want of material evidence, such continuance shall be granted only on such further showing, as may be required for continuance for that cause." The defendant's motion for continuance was not supported by an affidavit and the court did not err in overruling the motion for a continuance.

The accident in question happened near Mendota, about 8:30 in the evening on September 1, 1935, on the hard road which passes through the northern part of La Salle County. The truck was being driven in an easterly direction on the said road and the defendant was driving his automobile in a westerly direction, when the cars collided damaging the rear of the trailer and the left front side of the defendant's automobile.

The defendant insists that the evidence does not sustain the verdict. From a review of the same we are of the opinion that the verdict is not against the manifest weight of the evidence. The jury evidently believed the driver of the truck and his assistant's evidence was worthy of more weight than that of the defendant's witnesses. We are not inclined to disturb the verdict forthis reason.

The plaintiff made complaint that the trial court admitted improper evidence on the part of the appellee. We do not see how the appellant was injured in any manner by the admission of this evidence.

The defendant complained that the instructions given on behalf of the plaintiff were erroneous, namely, that, the second instruction stated if the plaintiff had proven by a preponderance of the evidence that they suffered damage and that such damage was caused by the negligence of the defendant, that then the plaintiff should recover. The criticism of this instruction is that it did not limit the negligence to that set forth in plaintiff's declaration. The correctness of the instruction depends somewhat upon the facts and the pleadings in the particular case in which it is given. The first count of the plaintiff's petition does not specify any particular negligence and is what is commonly called a general negligence count. It was not error for the court to give this instruction.

It is insisted by the appellant that the court erred by refusing to give defendants instruction Nos. 4 and 5. No. 4 is the one charging the jury, that the burden of proving their case was upon the plaintiffs and they must prove their case by a preponderance of the

evidence; or, if the evidence was equally balanced then the jury must find in favor of the defendant. The court struck out the words, "or if it is equally balanced", and this is the complaint that is now made against the instruction as given. Such instruction as presented is frequently given and we do not think it would have been error for the court to have given it as offered; neither do we think it was error for him to refuse it. The court did instruct the jury that the burden of proof was upon the plaintiff to establish his case by a preponderance of the evidence. By preponderance, it is frequently stated means the greater weight, or of better evidence. If the plaintiffs establish their case by a greater weight of the evidence it cannot be equally balanced. The jury could not have been misled, or the defendant prejudiced by the court striking out these words.

The plaintiff's fifth instruction, which the court modified was originally as follows: "The jury are further instructed that the burden of proof in this class of cases is always upon the party holding the affirmative, and who in this case is the Marvis-Stone Transfer Company, the plaintiff, and any matter asserted by one party and denied by the other can only be proved by a preponderance of the evidence." The court struck out the words "and who in this case is the Marvis-Stone Transfer Company the plaintiff", we do not see how the defendant could possibly be prejudiced by the court's action in striking out that part of the offered instruction. The substance of instruction No. 9 was covered by other instructions in the case.

We find no reversible error in this case. The judgment of the Circuit Court of La Salle County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73315—5M—3-32) 7

8463

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8963 AGENDA NO. 35

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935.

Helen Ward,

Appellee,

vs.

Will Hall,

Appellant.

Appeal from the Circuit Court of Winnebago County

DOVE-J.

This is an action brought by Helen Ward against Will Hall to recover damages for personal injuries sustained by her while riding as a guest in an automobile of the defendant The complaint as amended alleged that the plaintiff was riding in an automobile belonging to the defendant which was being driven along United States Highway No. 14 about two miles northeast of Harvard, Illinois at about two o'clock in the morning of July 1, 1934. It was alleged that the automobile in which she was riding was being driven by Alice Scandroli, under the supervision of and at the request of the defendant, and at the time and place of the accident the defendant, well knowing that said Alice Scandroli was in need of sleep and was having difficulty in keeping awake, wilfully, wantonly and maliciously persisted in permitting her to drive his automobile at the excessive rate of speed of sixty miles per hour and as a direct result thereof she drove the automobile off the highway, causing it to overturn, and the plaintiff was thereby injured. The answer of the defendant denied the material charges of the complaint, and upon a trial the jury returned a verdict in favor of the plaintiff for $7,000.00, upon which judgment was rendered and the record is here for review by appeal.

The evidence discloses that appellee at the time of the accident was nineteen years of age and was working on the evening of

Gen. No. 8023

In the Appellate Court of Illinois

Second District

October Term, A. D. 1930.

Bain, Pres.

Appellee,

vs.

Will Hall,

Appellant.

Appeal from the Circuit Court of Winnebago County

NOV-7.

This is an action brought by Helen Ward against Will Hall to recover damages for personal injuries sustained by her while riding as a guest in an automobile of the defendant. The complaint as amended alleged that the plaintiff was riding in an automobile belonging to the defendant which was being driven along United States Highway No. 14 about two miles northeast of Harvard, Illinois at about two o'clock in the morning of July 1, 1924. It was alleged that the automobile in which she was riding was being driven by Alice Sandroff, under the supervision of and at the request of the defendant, and at the time and place of the accident the defendant, well knowing that said Alice Sandroff was in need of sleep and was having difficulty in keeping awake, wilfully, wantonly and maliciously permitted in permitting her to drive his automobile at the excessive rate of speed of sixty miles per hour and as a direct result thereof she drove the automobile off the highway causing it to overturn, and the plaintiff was thereby injured. The answer of the defendant denied the material charges of the complaint, and upon a trial the jury returned a verdict in favor of the plaintiff for $7,000.00, upon which judgment was rendered and the record is here for review by appeal.

The evidence discloses that appellee at the time of the accident was nineteen years of age and was working on the farming of

June 30, 1934 as cashier for the Coronado theater. About ten thirty o'clock that evening, she, in company with appellant, whom she had never met before, and her friends Alice Scandroli and Stuart Sundberg left Rockford in appellant's Chevrolet two-door automobile. When they left Rockford, appellant was driving and appellee was sitting in the front seat at his right. Miss Scandroli and Sundberg were sitting in the rear seat. At Beloit they stopped at a tavern and all had a glass of beer and changed seats and from there Sundberg drove the car to a point near Darien, Wisconsin. At this place Sundberg stated he was too sleepy to drive and thereupon Miss Scandroli stated she could drive, offered to do so, and from that time until the accident, she drove and Sundberg sat with her in the front seat, while appellee and appellant occupied the rear seat. After they had driven some distance, they parked their car on the shore of Lake Delavan and after remaining there for one-half to three-quarters of an hour, started toward Rockford. Miss Scandroli continued to drive. It was discovered that they were not returning by the same route and they arrived at Walworth, Wisconsin. From there they started towards Harvard, a distance of seven or eight miles, and had proceeded to within a mile of Harvard when the accident occurred. Appellee testified that:"Just before the accident happened, two or three minutes, the car went off the road and came back on the pavement" and she thereupon asked appellant what was the matter with Alice (who was driving) and appellant replied that there was nothing the matter with her. Appellant denied this, but stated that as they were coming south from Walworth toward Harvard the car went over a bump or rough spot in the pavement and the car slightly swerved, whereupon, he, appellant, asked Miss Scandroli if she was all right, and she replied that she was. Appellee further testified that just before the accident happened, the automobile was being driven about fifty miles an hour and the right front and rear wheels went off the edge of the pavement and that when the driver endeavored to get them back on the highway and turned the car to the left for that purpose, that the car

June 30, 1934 as nearly as the records show. About ten
thirty o'clock that evening, she, in company with appellant, whom
she had never met before, and her friends Alice Sandstroll and Ethart
Sundberg left Rockford in appellant's Chevrolet two-door automobile.
When they left Rockford, appellant was driving and appellee was
sitting in the front seat at his right. Miss Sandstroll and Sundberg
were sitting in the rear seat. At Delavan they stopped at a tavern
and all had a glass of beer and changed seats and from there
Sundberg drove the car to a point near Darien, Wisconsin. At this
place Sundberg stated he was too sleepy to drive and thereupon
Miss Sandstroll stated she could drive, offered to do so, and from
that time until the accident, the three and Sundberg and Miss Sandstroll in
the front seat, while appellee and appellant occupied the rear seat. After
they had driven some distance, they parked their car on the shore
of Lake Delavan and after remaining there for one-half to three-
quarters of an hour, started toward Rockford. Miss Sandstroll con-
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appellant, asked Miss Sandstroll if she was all right, and she replied
that she was. Appellee further testified that just before the acci-
dent happened, the automobile was being driven about fifty miles an
hour and the right front and rear wheels went off the edge of the
pavement and that when the driver endeavored to get them back on the
highway and turned the car to the left for that purpose, that the car

turned over and she was pinned underneath and thereby received her injuries. Miss Scandroli testified on behalf of appellee and stated that her family had owned a Chevrolet car for five or six years before the accident and that she had driven it and other cars for three years on the highways alone and that on several occasions appellee had ridden with her when she was driving. She further testified that she had never before the time of this accident fallen asleep at the wheel. That up to the time of the accident, she was not tired, as she had only worked four hours the day previous and that was in the morning of that day. That she was not sleepy and had at no time that evening felt sleepy or tired and had no reason to know or any feeling that would indicate to her that she was going to go to sleep. That prior to the time when, and the place where the accident happened, she had not driven the car off the pavement, nor had it gone off the edge at any time. That when she took the wheel and commenced to drive, appellant requested her not to drive to exceed thirty-five or forty miles per hour, and that before and at the time of the accident she was driving between those rates of speed. Miss Scandroli further testified that she believed she went to sleep just before the accident happened and that she was awakened as soon as the car left the pavement. The evidence further discloses that the accident occurred about two o'clock in the morning, and that appellee was taken to a hospital and a police officer testified that while there appellant stated that he had driven for a while but got sleepy and that then Miss Scandroli took the wheel and that he, appellant knew he should have resumed driving because the driver had run off the road before as she was sleepy and tired. Appellant denied making these statements.

The foregoing is a fair resume of the evidence upon the question of liability as found in this record and from it counsel for appellee insists that the jury were warranted in believing that appellant became sleepy and tired and that instead of stopping his automobile and taking a sleep or refreshing himself, he turned the management of his car over to Miss Acandroli, knowing that she, too, was sleepy

turned over and she was pinned underneath and thereby received her injuries. Miss Beardsell testified on behalf of appellee and stated that her family had owned a Chevrolet car for five or six years before the accident and that she had driven it and other cars for three years on the highways alone and that on several occasions appellee had ridden with her when she was driving. She further testified that she had never before the time of this accident fallen asleep at the wheel. That up to the time of the accident, she was not tired, as she had only worked four hours the day previous and that was in the morning of that day. That she was not sleepy and had no time that evening felt sleepy or tired and had no reason to know or any feeling that would indicate to her that she was going to go to sleep. That prior to the time when, and the place where the accident happened, she had not driven the car off the pavement, nor had it gone off the edge at any time. That when she took the wheel and commenced to drive, appellant requested her not to drive to exceed thirty-five or forty miles per hour, and that before and at the time of the accident she was driving between those rates of speed. Miss Beardsell further testified that she believed she went to sleep just before the accident happened and that she was awakened as soon as the car left the pavement. The evidence further discloses that the accident occurred about two o'clock in the morning, and that appellee was taken to a hospital and a police officer testified that while there appellant stated that he had driven for a while but got sleepy and that then Miss Beardsell took the wheel and that he, appellant knew he should have ceased driving because the driver had run off the road before as she was sleepy and tired. Appellant denied making these statements.

The foregoing is a fair resume of the evidence upon the question of liability as found in this record and from it counsel for appellee insists that the jury were warranted in believing that appellant became sleepy and tired and that instead of stopping his automobile and taking a sleep or refreshing himself, he turned the management of his car over to Miss Beardsell, knowing that she, too, was sleepy

and tired and likely to fall asleep while driving. That he got into the back seat with appellee and remained at a place where the steering wheel and controls were beyond his reach and that he was therefore guilty of wilful and wanton conduct in failing to exercise ordinary care when a known and extraordinary danger was imminent.

In the recent case of Farley v. Mitchell, 282 Ill. App. 555, the court said: "A great deal of language has been used in many cases in the attempt to define with mathematical certainty the difference between ordinary negligence and wilful and wanton negligence. More recent cases have held that this is virtually impossible; that whether an act is wilful and wanton depends upon the particular circumstances of each case. In Bernier v. Illinois Cent. R. R. Co., 296 Ill. 464, the court said: 'It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a wilful or wanton Act.' And in Bremer v. Lake Erie & W. R. Co. 318 Ill. 11, it was said: ' What degree of negligence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement.' However, the decided cases seem to agree that one of the factors distinguishing a wilful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. Lake Shore & Michigan Southern Ry. Co. v. Bodemer, 159 Ill. 596; Walldren Express & Van Co. v. Krug, 291 Ill. 472; Jeneary v. Chicago & Interurban Traction Co., 306 Ill. 392; Brown v. Illinois Terminal Co., 319 Ill. 326; Streeter v. Humrichouse, 357 Ill. 234."

In the instant case, Miss Scandroli, the driver of the car was called as a witness by appellee and she testified that she was not tired, had not been sleepy or felt sleepy and there was nothing which indiciated to her before the accident happened that she was likely to fall asleep and she was positive that she had not dozed off at any other time while driving. This evidence is not in any

and tired and likely to fall asleep while driving. Just as she turned the bend sent with appellee and remained at a place where the steering wheel and controls were beyond his reach and that he was therefore guilty of wilful and wanton conduct in failing to exercise ordinary care when a known and extraordinary danger was imminent.

In the recent case of Tarley v. Mitchell, 288 Ill. App. 288, the court said: "A great deal of language has been used in many cases in the attempt to define with mathematical certainty the difference between ordinary negligence and wilful and wanton negligence. More recent cases have held that this is virtually impossible; that whether an act is wilful and wanton depends upon the particular circumstances of each case. In Bernier v. Illinois Cent. R. R. Co., 288 Ill. 488, the court said: 'It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a wilful or wanton act.' And in Brewer v. Lake Erie & W. R. Co. 218 Ill. 12, it was said: ' What degree of negligence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement.' However, the decided cases seem to agree that one of the factors distinguishing a wilful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. Lake Shore & Michigan Southern Ry. Co. v. Bodemer, 139 Ill. 596; Walldren Mattress & Van Co. v. Kraus, 221 Ill. 472; Jensen v. Chicago & Interurban Traction Co., 306 Ill. 392; Brown v. Illinois Terminal Co., 319 Ill. 386; Streeter v. Hurrichouse, 357 Ill. 284."

In the instant case, Miss Beardroll, the driver of the car was called as a witness by appellee and she testified that she was not tired, had not been sleepy or felt sleepy and there was nothing which indicated to her before the accident happened that she was likely to fall asleep and she was positive that she had not dozed off at any other time while driving. This evidence is not in any

way contradicted. Appellant testified he did not know she was sleepy or tired and in view of her testimony, he could not have known that she was, and there is no evidence to prove that appellant knew or had cause to know that she was likely to fall asleep while driving. We do not believe that the conduct of appellant as disclosed by this record exhibits such an indifference to consequences as makes a case of constructive or legal wilfulness. Furthermore, appellee was at all times in the same position to have knowledge of the condition of Miss Scandroli as was appellant. Appellee made no objections to anything that was done or anything that happened on this trip. She acquiesced and made no protest at any time to the driving of Miss Scandroli or the manner in which she was handling the car. Her counsel say that these four young people, in driving about the country and in visiting the tavern and in drinking and in stopping along the shores of the lake, were trying to escape the terrific heat which scorched all northern Illinois during the late hours of June 30, 1934 and the early hours of the morning following. They were therefore all engaged in a common enterprise and appellee had equal opportunity to observe the condition of Miss Scandroli and to know whether she was likely to fall asleep while driving as did appellant. If appellant was guilty of wilful and wanton conduct on this occasion, so was appellee, and there can be no recovery. Willgeroth v. Maddox, 281 Ill. App. 480.

In our opinion the trial court erred in refusing to grant appellant's motion for a new trial and for that error the judgment of the Circuit Court is reversed and the cause is remanded.

Reversed and Remanded.

her contradicted. Appellant testified he did not know she was sleepy or tired and in view of her testimony, he could not have known that she was, and there is no evidence to prove that appellant knew or had cause to know that she was likely to fall asleep while driving. We do not believe that the conduct of appellant as disclosed by this record exhibits such an indifference to consequences as makes a case of constructive or legal wilfulness. Furthermore, appellee was at all times in the same position to have knowledge of the condition of Miss Scandroll as was appellant. Appellee made no objection to anything that was done or anything that happened on this trip. She acquiesced and made no protest at any time to the driving of Miss Scandroll or the manner in which she was handling the car. Her counsel say that these four young people, in driving about the country and in visiting the tavern and in drinking and in a tryst along the shores of the lake, were engaged in seeing the beauty that which adorned all northern Illinois during the late hours of June 20, 1934 and the early hours of the morning following. They were therefore all engaged in a common enterprise and appellee had equal opportunity to observe the condition of Miss Scandroll and to know whether she was likely to fall asleep while driving as did appellant. If appellant was guilty of wilful and wanton conduct on this occasion, so was appellee, and there can be no recovery. Willgeroth v. Maddox, 281 Ill. App. 480.

In our opinion the trial court erred in refusing to grant appellant's motion for a new trial and for that error the judgment of the Circuit Court is reversed and the cause is remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8982 AGENDA NO. 14

In the Appellate Court of Illinois

Second District

October Term, A. D. 1935.

Sadie Kalina,

Appellee,

vs.

John Samois and George Calamaris individually and as co-partners doing business as the Paradise Food Mart,

Appellants,

Appeal from the Circuit Court of Kane County

DOVE-J.

This is a suit brought by Sadie Kalina to recover damages for personal injuries sustained by her as a result of falling upon the sidewalk in front of the entranceway of defendants' store. The complaint alleged that the defendants were engaged in the business of selling fruits and vegetables, conducting a retail store in Aurora, that on April 17, 1934 they permitted various amounts of refuse of fruits, vegetables and fresh produce to be strewn about the front entranceway of their store an d onto the sidewalk in front thereof, that said refuse was dangerous to the customers of the defendants, that the defendants by the exercise of reasonable care should have known that said refuse would endanger the plaintiff, that the defendants held out to the general public an implied invitation to come upon their premises for the purpose of trading with them, and that they owed to the plaintiff and to the public the duty of keeping the premises in a reasonably safe condition in order to avoid injury to persons coming upon or leaving their premises. The complaint then alleged that as the plaintiff was leaving the premises on April 17, 1934, after making certain purchases and while she was in the exercise of due care and caution for her own safety, she stepped upon some such refuse on the sidewalk in front of defendants' premises, causing her to slip and fall,

Gen. No. 4788 Abstract No. 14

In the Appellate Court of Illinois

Second District

October Term, A. D. 1938.

Bailie Saltzer,

Appellee,

vs. Appeal from the Circuit Court

John Zemola and Sabre Delicatessen, Incorporated, and as co-partners doing business as the Paradise Food Store,

of Cook County

Appellants,

Bond-A.

This is a suit brought by Bailie Saltzer to recover damages for personal injuries sustained by her as a result of falling upon the sidewalk in front of the entrance-way of defendants' store. The complaint alleged that the defendants were engaged in the business of selling fruits and vegetables, conducting a retail store in Berwyn, that on April 17, 1934 they permitted various amounts of of refuse of fruits, vegetables and fresh produce to be strewn about the front entrance-way of their store on & onto the sidewalk in front thereof, that said refuse was dangerous to the customers of the defendants, that the defendants by the exercise of reasonable care should have known that said refuse would endanger the plaintiff, that the defendants held out to the general public an implied invitation to come upon their premises for the purpose of trading with them, and that they owed to the plaintiff and to the public the duty of keeping the premises in a reasonably safe condition in order to avoid injury to persons coming upon or leaving their premises. The complaint then alleged that as the plaintiff was leaving the premises on April 17, 1934, after trading certain purchases and while she was in the exercise of due care and caution for her own safety, she stepped upon the refuse on the sidewalk in front of defendants' premises, slipped and fell.

and as a result thereof she was injured. The allegations of the complaint were denied by the answer of the defendants and after the issues were made up, a trial was had resulting in a verdict and judgment in favor of the plaintiff for $1500.00 and the record is brought to this court for review.

The evidence discloses that appellants, since March 1, 1934, had been engaged in conducting a retail fruit and vegetable business in Aurora and that during the afternoon of April 17, 1934, appellee left her home and proceeded to the store operated by appellants, and while there made some purchases. That upon leaving the store, she observed a large crowd standing about a truck at the curb, from which Mason jars were being exhibited; that the entranceway to the store was partially filled with boxes which left a narrow space through which she walked and as she stepped onto the sidewalk from the entranceway, her left foot was caused to slip, either upon some onion tops or other vegetable refuse, and she was thrown to the sidewalk, injuring her left leg and knee. The testimony of appellee was corroborated by other witnesses, who observed her fall and who testified that they noticed onion tops in the entranceway and a green smudge or stain immediately thereafter on the sidewalk. Other witnesses testified that it was the usual practice of appellants' clerks to throw vegetable refuse, consisting of onion and carrot tops, onto the floor if the customers did not desire them, and that the store was in that condition the opening day and so continued to and including the day of the accident.

It is first contended by appellants that the trial court erred in refusing a peremptory instruction at the close of the plaintiff's case. In this connection counsel directs our attention to the fact that the evidence discloses that the substance upon which appellee slipped was on the sidewalk in front of appellants' place of business and that it was the duty of the City of Aurora to use reasonable

and as a result thereof she was injured. The allegations of the complaint were denied by the answer of the defendants and after the issues were made up, a trial was had resulting in a verdict and judgment in favor of the plaintiff for $1500.00 and the record is brought to this court for review.

The evidence discloses that appellant, also named J. Doe, has been engaged in conducting a retail fruit and vegetable business in Denver and that during the afternoon of April 17, 1924, appellee left her home and proceeded to the store operated by appellants, and while there made some purchases. Just upon leaving the store, she observed a large crowd standing about a truck at the curb, from which bacon jars were being exhibited; that the ingressway to the store was partially filled with boxes which left a narrow space through which she walked and as she stepped onto the sidewalk from the entrancewaY, her left foot was caused to slip, either upon some onion tops or other vegetable refuse, and she was thrown to the sidewalk, injuring her left leg and knee. The testimony of appellee was corroborated by other witnesses, who observed her fall and who testified that they noticed onion tops in the ingressway and a green smudge or stain immediately thereafter on the sidewalk. Other witnesses testified that it was the usual practice of appellants' clerks to throw vegetable refuse, consisting of onion and carrot tops, into the floor if the customers did not desire them, and that the store was in that condition the opening day and so continued in the business, for all of the witnesses.

Little fault contended by appellants that the trial court erred in refusing a peremptory instruction at the close of the plaintiff's case. In this connection counsel directly and strenuously contend that the evidence discloses that the substance upon which appellee slipped was on the sidewalk in front of appellants' place of business and that it was the duty of the city of Denver to use reasonable

diligence to keep this sidewalk in a reasonably safe condition for the use of the travelling public and that this duty did not devolve upon appellants. As a general proposition this is true, but in the instant case the evidence tended to prove that appellants customarily and habitually permitted such vegetable refuse matter to be thrown upon and to remain not only on the floor of their store, but also upon the sidewalk to which the entranceway led. The evidence further disclosed that two hours or more before the accident happened, onion tops and other refuse was noticed to be lying on the entry platform and it is but reasonable to assume that these eventually found their way to the sidewalk as a result of customers going through the entranceway to and from the sidewalk. These facts and inferences to be drawn therefrom, together with the uncontradicted evidence of appellee that her fall was caused by her stepping from the entranceway to the sidewalk upon onion tops, inclines us to the conclusion that the trial court properly denied appellants' motion for an instructed verdict. Whether appellee was in the exercise of due care for her own safety and whether appellants were guilty of the negligence charged and had notice either actual or constructive of the presence of the substance upon which appellee slipped, are all questions of fact and under the evidence found in this record it would have been erroneous not to have submitted those questions to the jury.

Appellants finally insist that the court erred in embracing in its instructions to the jury the following: "The Court instructs the jury that if you believe from a preponderance of the evidence, under the instructions of the Court, that the defendants in the conduct of their business habitually and continuously allowed and permitted various amounts of vegetable refuse to be strewn out into the entryway of the defendants' premises and on the sidewalk immediately in front thereof, and if you further believe from a preponderance of the evidence under the instructions of the court that at

negligence to keep this sidewalk in a reasonably safe condition for the use of the travelling public and that this duty did not devolve upon appellants. In a general verdict which in turn, for in the instant case the evidence tended to prove that appellants reasonably and habitually permitted such vegetable refuse matter to be thrown upon and to remain not only on the floor of their store, but also upon the sidewalk to which the entranceway led. The evidence further discloses that two hours or more before the accident happened, melon tops and other refuse was noticed to be lying on the entry platform and it is but reasonable to assume that these eventually found their way to the sidewalk as a result of customers going through the entranceway to and from the sidewalk. These facts and inferences to be drawn therefrom, together with the uncontradicted evidence of appellee that her fall was caused by her stepping from the entranceway to the sidewalk upon melon tops, induces us to the conclusion that the trial court properly denied appellants' motion for an instructed verdict. Whether appellee was in the exercise of due care for her own safety and whether appellants were guilty of the negligence charged and had notice either actual or constructive of the presence of the substance upon which appellee slipped, are all questions of fact and under the evidence herein in this record it would have been erroneous not to have submitted those questions to the jury.

Appellants finally insist that the court erred in refusing to give instructions to the jury the following: "The court instructs the jury that if you believe from a preponderance of the evidence, under the instructions of the court, that the defendants in the conduct of their business habitually and continuously allowed and permitted various amounts of vegetable refuse to be strewn out into the entryway of the defendants' premises and on the sidewalk immediately in front thereof, and if you further believe from a preponderance of the evidence under the instructions of the court that at

and before the time of the occurrence in question there were certain onion tops or other vegetable refuse from the defendants' store upon the sidewalk immediately in front of said store and that the same under all the facts and circumstances in evidence in this case, constituted a danger to persons, including the plaintiff, stepping from said entryway platform to the sidewalk while using ordinary care for their own safety, and if you further believe from a preponderance of the evidence under the instructions of the Court, that the defendants in the exercise of reasonable care could have discovered such onion tops or vegetable refuse, if any, and could have removed the same from said sidewalk and had a reasonable time and a reasonable opportunity to do so, and if you further believe from a preponderance of the evidence, under the instructions of the Court that the defendants negligently and carelessly failed to discover and remove said onion tops or vegetable refuse, if any, and in so failing if they did so fail, were guilty of the negligence charged in Count 1 of plaintiff's complaint, if so shown by a preponderance of the evidence, and if you further believe from a preponderance of the evidence, under the instructions of the Court, that as a direct result of such negligence, if any, on the part of the defendants, the plaintiff slipped, fell and was injured and damaged as charged in said count, and if you further believe from a preponderance of the evidence, under the instructions of the Court, that at and at all times before the occurrence in question the plaintiff exercised ordinary care for her own safety, then in such case if shown by a preponderance of the evidence, you should find the defendants guilty. The Court instructs the jury that if you believe from a preponderance of the evidence under the instructions of the Court, that the defendants in the conduct of their business habitually and continuously allowed and permitted various amounts of vegetable refuse to be strewn out into the entryway to the defendants' premises and on the sidewalk immediately in front thereof, and if you further believe from a preponderance of

the evidence, under the instructions of the Court, that at and before the time of the occurrence in question there were certain onion tops or other vegetable refuse from the defendants' store upon the sidewalk immediately in front of said store, and that the same under all the facts and circumstances in evidence in this case constituted a danger to persons, including the plaintiff, stepping from said entryway platform to the sidewalk while using ordinary care for their own safety, and if you further believe from a preponderance of the evidence, under the instructions of the Court that the defendants in the exercise of reasonable care could have discovered such onion tops or vegetable refuse, if any, and had a reasonable time and a reasonable opportunity to have given plaintiff a warning of the presence thereof, and if you further believe from a preponderance of the evidence that the defendants negligently and carelessly failed to give plaintiff such warning and that in so failing, if they did so fail, the defendants were guilty of the negligence charged in Count 2 of plaintiff's complaint, if so shown by a preponderance of the evidence; and if you further believe from a preponderance of the evidence under the instructions of the Court, that, as a direct result of such negligence, if any, on the part of the defendants, the plaintiff slipped, fell and was injured and damaged as charged in said count, and if you further believe from a preponderance of the evidence under the instructions of the Court, that at, and at all times before the occurrence in question, the plaintiff exercised ordinary care for her own safety, then in such case if shown by a preponderance of the evidence, you should find the defendants guilty."

The criticism which appellants' counsel make to this instruction is that certain facts are therein set forth and that the court then, by this instruction, advised the jury that if these are found to be true, that then defendants are guilty of negligence. Counsel for appellants further insist that the hypothesis contained

the evidence, under the instructions of the Court, that it was dangerous the time of the occurrence in question there were certain salon lamps or other vehicle refuse from the defendants' wagon under the wheels immediately in front of said wagon, and that the same had or all the facts and circumstances in evidence in this case constituted a danger to persons, including the plaintiff, resulting from said anyway platform to the sidewalk while using ordinary care for their own safety, and if you further believe from a preponderance of the evidence, under the instructions of the Court that the defendants in the exercise of reasonable care could have discovered such unsafe or vendable refuse, if any, and had a reasonable time and a reasonable opportunity to have given plaintiff a warning of the presence thereof, and if you further believe from a preponderance of the evidence that the defendants negligently and wrongfully failed to give plaintiff such warning and that in so doing, if they did so fail, the defendants were guilty of the negligence charged in Count 2 of plaintiff's complaint, if so shown by a preponderance of the evidence; and if you further believe from a preponderance of the evidence, under the instructions of the Court, that, as a direct result of such negligence, if any, on the part of the defendants, the plaintiff minor, fell and was injured and damaged as charged in said count, and if you further believe from a preponderance of the evidence under the instructions of the Court, that at, and at all times before the occurrence in question, the plaintiff exercised ordinary care for her own safety, then in such case if shown by a preponderance of the evidence, you should find the defendants guilty."

The criticism which appellants' counsel make to this instruction is that certain facts are therein set forth and that the court has, by this instruction, advised the jury that if these are found to be true, that then defendants are guilty of negligence. Counsel for appellees further insist that the hypothesis contained

in this instruction is not supported by the evidence. In our opinion the evidence in this record warranted the giving of this instruction and we have examined the several cases cited and relied upon by appellant in support of their contehtion, viz: West Chicago St. Ry. Co. v. Winters, 107 Ill. App. 221; Aaron Co. v. Hirschfeld, 89 Ill. App. 205; Cummings v. Drennan, 155 Ill. App. 165; Byrne v. Marshall Field & Co., 142 Ill. App. 72 and Tripoli Savings Bank v. Schnadt, 135 Ill. App. 373, and fimd that the instructions reviewed in each of those cases were different to the instruction complained of here. Furthermore, the record disbloses that counsel made no such specific objection as is now urged in the trial court, but in reply to the court's request to state their objections to the trial court before the jury was instructed, stated they had none. Appellants are therefore precluded from now raising these objections in this court.

Finding no reversible error in this record, the judgment of the Circuit Court of Kane County is affirmed.

Judgment Affirmed.

The jury instruction is not supported by the evidence. If our opinion the evidence in this record warranted the giving of this instruction and we have examined the authorities cited and relied upon by appellant in support of their contention, viz: West Chicago St. Ry. Co. v. Feloney, 167 Ill. App. 488; Lewis Co. v. Chamberlin, 66 Ill. App. 490; Chicago v. Freeman, 115 Ill. App. 367; Chicago v. Marshall Field & Co., 145 Ill. App. 77; and Chicago Railway Co. v. Schmidt, 144 Ill. App. 372, and find that the instructions reviewed in each of those cases were different in the instruction complained of here. Furthermore, the record disclosed that counsel made no such specific objection as is now urged in the trial court, but in reply to the court's request to state their objections to the trial court before the jury was instructed, counsel they had none. Objections are therefore precluded from our raising those objections in this court.

Finding no reversible error in this record, the judgment of the Circuit Court of Lake County is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 8994 AGENDA NO. 47

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1936.

JOHN BUFFO, Appellee, v. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Appellant.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY.

DOVE, J.

This action was commenced before a justice of the peace, the plaintiff seeking to recover damages under the provisions of an insurance policy issued by the defendant to the plaintiff, which contained a provision obligating the defendant to pay the plaintiff $10.00 per month if the plaintiff became totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said policy, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit. Upon appeal a trial was had in the Circuit Court, resulting in a verdict for $405.66. The court required a remittitur of $61.66 and rendered judgment against the defendant and in favor of the plaintiff for $344.00. That judgment was subsequently reversed by this court. Buffo v. Metropolitan Life Ins. Co. 277 Ill. App. 366. This court held

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1964.

JOHN BURTON, Appellee, v. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Appellant.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY.

MOTE, J.

This action was commenced before a justice of the peace, the plaintiff seeking to recover damages under the provisions of an insurance policy issued by the defendant to the plaintiff, which contained a provision obligating the defendant to pay the plaintiff $10.00 per month if the plaintiff became totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said policy, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit. Upon appeal a trial was had in the Circuit Court, resulting in a verdict for $400.00. The court required a remittitur of $23.00 and rendered judgment against the defendant was in favor of the plaintiff for $324.00. That judgment was subsequently reversed by this court. Burton v. Metropolitan Life Ins. Co. 277 Ill. App. 320. This cause

that the policy which forms the basis of this suit was a total disability policy as distinguished from an occupational disability policy, and that it was incumbent upon the plaintiff to prove that he was totally and permanently disabled by the injury which he received so as to be prevented from engaging in any occupation and performing any work for compensation or profit. We stated in our former opinion that the record disclosed that the plaintiff below had confined his proof solely to that of demonstrating that he was unable to perform the duties incident and necessary to that of the business in which he was engaged which was that of selling fruit and vegetables at wholesale and retail, and that there was no attempt to show any inability to engage in any other occupation or from performing any other work for compensation or profit. The judgment was therefore reversed and the cause was remanded for the reason that the judgment was unsupported by the evidence.

Upon the second trial in the Circuit Court, the jury found the issues for the plaintiff and assessed his damages at $480.00. Upon this verdict judgmentwas rendered and the record is again in this court for review.

The defendant below, appellant here, offered no testimony upon the trial below. It appears from the evidence that appellee, prior to December 6, 1930, was engaged in the wholesale and retail fruit and vegetable business in the City of Rockford. In connection with his business he handled barrels, sacks, boxes, crates and baskets. He bought car loads or part of car loads of fruits and vegatables from different wholesale firms and distributed them by truck. On December 6, 1930, appellee was riding in one of his trucks which was then being driven by his son. The driver suddenly applied the brakes in order to avoid a collision and appellee was thrown against the windshield, causing the back of his right hand to be severely lacerated. The attending physician described the injury as an incised laceration of the right hand, which extended through the

[illegible] the policy which [illegible] the basis of this suit was a total liability policy as distinguished from an occupational disability policy, and that it was incumbent upon the plaintiff to prove that he was totally and permanently disabled by the injury which he received so as to be prevented from engaging in any occupation and attending any work for compensation or profit. We stated in our former opinion that the record disclosed that the plaintiff below had exercised his proof solely to that of demonstrating that he was unable to perform the duties incident and necessary to that of the business in which he was engaged which was that of selling fruit and vegetables at wholesale and retail, and that there was no attempt to show any inability to engage in any other occupation or from performing any other work for compensation or profit. The judgment was therefore reversed and the cause was remanded for the reason that the judgment was unsupported by the evidence.

Upon the second trial in the Circuit Court, the jury found the issues for the plaintiff and assessed his damages at $[illegible]3850.00. Upon this verdict judgment was rendered and the record is again in this court for review.

The defendant below, appellant here, offered no testimony upon the trial below. It appears from the evidence that appellee, prior to December 6, 1930, was engaged in the wholesale and retail fruit and vegetable business in the City of Rockford. In connection with his business he handled barrels, sacks, boxes, crates and baskets. He bought car loads or part of car loads of fruits and vegetables from different wholesale firms and distributed them by truck. On December 6, 1930, appellee was riding in one of his trucks and was then being driven by his son. The driver suddenly applied the brakes in order to avoid a collision and appellee was thrown against the windshield, causing the back of his right hand to be severely lacerated. The attending physician described the injury as an incised laceration of the right hand, which extended through the

skin, superficial and deep facia, the tendons, tendon sheaths and through the arteries, vessels and nerves. That he sutured the tendons, which required thirty-five or forty stitches, repaired the sheaths and put the hand on a splint. Subsequently the hand and forearm became infected and pus was discharged from the wound for four or six weeks. The cut then healed and the infection disappeared. Thereafter the hand became stiff, the fingers were fixed and appellee could not flex them, the muscles of the hand and forearm became shrunken and atrophied as did also some of the muscles of the upper part of the right arm. This witness further testified that appellee's injury affected the right hand, that it did not affect ~~the~~ his left hand or arm and his right shoulder was not affected. That appellee was able to do, after the injury, the same things that he was able to do before the injury except ~~xxxx~~ he could not use to advantage his right arm. That since the injury "he is a one-armed man and I would say the injury was limited to the entire right hand and arm." Appellee testified that his left arm was in no way affected and was as good as it ever was and that he could flex his right elbow and that he could use the upper part of his right arm and shoulder.

The record further discloses that during appellee's direct examination his counsel inquired of him what he had done about securing any other work in any of the shops or factories in Rockford and he replied that he had tried to get a job as a watchman. Counsel for appellant moved to strike the answer. The court, without ruling on this motion, inquired of the witness whether he could do a watchman's job and apellee replied that he would have tried. He was then asked what happened when he tried, and he answered: "They told me they couldn't use me." The court then inquired: "Did you start in anywhere?" and appellee answered: "No, they wouldn't give me a job." The court then inquired: "Could you do a watchman's work?". The witness answered, "No". Counsel

skin, muscle, and deep fascia, the tendons, tendon sheaths and through the arteries, vessels and nerves. That is accepted the treatment, which required thirty-five or forty stitches, re-pairing the sheaths and cut the hand on a splint. Subsequently the bone and tissues became infected and pus was discharged from the wound for four or six weeks. The cut then healed and the infection disappeared. Thereafter the hand became stiff, the fingers were fixed and appellee could not flex them, the muscles of the hand and forearm became atrophied in did also have at the muscles of the upper part of the right arm. This witness further testified that appellee's injury affected the right hand, that it did not affect the left hand or arm and his right shoulder was not affected. That appellee was able to do, after the injury, the same things that he was able to do before the injury except that he could not use to advantage his right arm. That since the injury "he is a one-armed man and I would say the injury was limited to the entire right hand and arm." Appellee testified that his left arm was in no way affected and was as good as it ever was and that he could flex his right elbow and that he could use the upper part of his right arm and shoulder.

The issue further discloses that during appellee's direct examination his counsel inquired of him what he had done about securing any other work in any of the shops or factories in Rockford and he replied that he had tried to get a job as a watchman. Counsel for appellant moved to strike the answer. The court, without ruling on this motion, inquired of this witness whether he could do a watchman's job and appellee replied that he would have tried. He was then asked what happened when he tried, and he answered: "They told me they couldn't use me." The court then inquired: "Did you start in anywhere?" and appellee answered: "No, they wouldn't give me a job." The court then inquired: "Could you do a watchman's work?". The witness answered, "No". Counsel

for appellant moved the court to strike the answer. The court then said: "No, he says he can't do it. There isn't any use of trying issues not in here. The only question is, is this man totally disabled." Over objection of counsel for appellant, counsel for appellee was then permitted to ask the witness whether he was able to use a pick, whether he could ~~use~~ hold one in his hand, whether he could handle a wheelbarrow and was then asked to "State if there is any kind of physical labor that you can do physically, that you are able to do at this time?" The witness, over counsel's objection, answered: "No, I could take and sell shoe strings with a sign on my back if my wife would have let me. That's the only thing that I know of I could have been able to do right now." The court struck the reference by the witness to his wife.

Appellee, in addition to calling the several witnesses who testified upon the previous hearing, also called Dr. Egbert W. Fell, A.M.Monks, M.E. Carlson, and Richard Ledgett. Dr. Fell testified that he was a specialist in nervous and mental diseases and examined appellee during the noon recess of the day the cause was being tried for the second time. That the examination took about one hour and disclosed that appellee had a paralysis of the right forearm and hand, with atrophy of the muscles of the forearm. That appellee had a contracture of his right hand, but that his thumb was free and movable, that he had a tremor of the right hand and an anesthesia to pain over a portion of the right half of his body, except the head and neck. He further testified that appellee's hearing was all right, heart regular, blood pressure normal, that he could raise his right arm and there was nothing about the condition of his body which prevented him from using his left hand and arm freely. That he could perform physical manual labor limited only by the fact that appellee had but very little use of his right hand and that

Appellant moved the court to strike the answer. The court then said: "No, he says he can't do it. There isn't any use of trying. Leave not in here. The only question is, is this man totally disabled." Over objection of counsel for appellant, counsel for appellee was then permitted to ask the witness whether he was able to do a job, whether he could use one in his hand, whether he could handle a wheelbarrow and was then asked to "Guess if there is any kind of physical labor that you can do physically, that you are able to do at this time?" The witness, over counsel's objection, answered: "No, I could not physically take anything with a plus on my back if my life would hang on it. That's the only thing that I know of I could have been able to do right now." The court struck the testimony by the witness to his wife.

Appellee, in addition to calling the several witnesses who testified upon the previous hearing, also called Dr. Robert W. Fell, M.Kerr, M.M. Coulson, and Richard Ledyard. Dr. Fell testified that he was a specialist in nervous and mental diseases and examined appellee during the noon recess of the day the cause was being tried for the second time. That the examination took about one hour and disclosed that appellee had a paralysis of the right forearm and hand, the atrophy of the muscles of the forearm. That muscles had a contracture of his right hand, but that his hand was free and movable; that he had a tremor of the right hand and an anesthesia to pain over a portion of the right half of his body, except the head and neck. He further testified that appellee's hearing was all right, heart regular, blood pressure normal, that he could raise his right arm and there was nothing about the condition of his body which prevented him from using his left hand and arm freely. That he could perform physical manual labor limited only by the fact that appellee had but very little use of his right hand and that

parts of his body on the right side were insensible to pain.

A.M.Monks testified that he was the employment manager of the Barber-Coleman Company of Rockford and that within the past few months before the second trial, appellee came there and asked for work. M.E.Carlson testified that he was purchasing agent and employment manager of the Rockford Drilling Machine Company and that he had seen and observed appellee once at the office of his company. Richard Ledgett testified that prior to December 6, 1930 he had had business dealings with appellee for a number of years. That they would split cars of produce and that appellee would dispose of his part. That he had not observed appellee working since December 6, 1930.

In our former opinion we said: "An examination of the record in this case discloses without controversy that the appellee confined his proof solely to that of demonstrating he was unable to perform the duties incident and necessary to that of the wholesale and retail fruit and vegetable business. There is no attempt made to show any inability to engage in any other occupation or from performing any other work for compensation or profit. Under such state of facts this court is of the opinion that appellee has not proven he is totally and permanently disabled by the alleged injury so as to be prevented from engaging in any occupation and performing any work for compensation or profit, in accordance with the terms of the policy". The competent additional testimony offered upon the trial, the record of which we are now reviewing, does not supply what we said in our former opinion must be shown before there could be a recovery under the provisions of the policy sued on.

In our opinion the trial court should have granted appellant a new trial and for that reason the judgment of the Circuit Court is reversed and the cause remanded.

JUDGMENT REVERSED AND REMANDED.

parts of his body on the right, this was inescapable in fact.

L.M.Monks testified that he was the employment manager of the Barber-Colman Company of Rockford and that within the past few months before the second trial, appellee came there and asked for work. K.E.Carlson testified that he was purchasing agent and employment manager of the Rockford Drilling Machine Company and that he had seen and observed appellee once at the office of his company. Elmerd Ledgett testified that prior to December 6, 1930 he had had business relations with appellee for a number of years. That they would split cars of produce and that appellee would dispose of his part. That he had not observed appellee working since December 6, 1930.

In our former opinion we said: "An examination of the record in this case discloses without controversy that the appellee confined his proof solely to that of demonstrating he was unable to perform the duties incident and necessary to that of the wholesale and retail fruit and vegetable business. There is no attempt made to show any inability to engage in any other occupation or from performing any other work for compensation or profit. Under such state of facts this court is of the opinion that appellee has not proven he is totally and permanently disabled by the alleged injury so as to be prevented from engaging in any occupation and performing any work for compensation or profit, in accordance with the terms of the policy". The remainder additional testimony offered upon the trial, the record of which we are now reviewing, does not supply what we said in our former opinion must be shown before there could be a recovery under the provisions of the policy sued on.

In our opinion the trial court should have granted appellant a new trial and for that reason the judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

1005

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

283 I.A. 651

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9005 AGENDA NO. 41

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1935.

HELEN F. HAYES, v. ANDREW H. RYAN.	APPEAL FROM THE CIRCUIT COURT OF OGLE COUNTY.

DOVE, J.

This suit was brought by Helen Hayes against Andrew H. Ryan to recover damages sustained by her as a result of a collision of the automobile in which she was riding with an automobile belonging to the defendant. The issues made by the complaint and answer were submitted to the court for determination, a jury having been waived, resulting in a judgment for $6500.00 in favor of the plaintiff and the record is in this court for review by appeal.

The evidence discloses that a public gravel road, known as the I. C. trail intersects an unnamed public gravel road in the unincorporated village of White Rock in Ogle County. The I. C. trail approaching the intersection from the west runs in an easterly and westerly direction until within several hundred feet of the intersection, at which point it starts to make a gradual curve in a northeasterly direction. The unnamed gravel road runs straight north and south. Appellee lived with her husband and three children about one mile from the intersection on the unnamed gravel road and on the afternoon of August 16, 1934 between five and six o'clock, she, accompanied by her husband,

left their home in their Paige sedan. Melville Hayes, the husband, was driving and they proceeded along the unnamed gravel road in a southerly direction. Appellant's automobile, driven by Donald Garcia, was travelling along the I.C. trail going in an easterly or northeasterly direction. The automobile in which appellee was riding, as it approached the intersection, was on the left of appellant's automobile and appellant's automobile was on the right of the automobile in which appellee was riding. Mr. and Mrs. Hayes and Garcia were the only occurence witnesses and according to the testimony of Mr. and Mrs. Hayes, they had, from a point sixty to seventy feet north of the intersection, a clear and unobstructed view of the I.C. trail for a distance of several hundred feet west of the intersection, this being the direction from which appellant's automobile was approaching the intersection, that when they were within fifty or sixty feet from the intersection, they looked both east and west but saw no automobile and that they again looked east and west as they approached the intersection, but again saw no automobile. Mr. and Mrs. Hayes further testified that they did not stop as they approached the intersection, but entered the intersection in second gear at a speed of from eight to twelve miles per hour, and that their car remained at that rate of speed and in second gear until after the collision. Mr. Hayes testified that he first saw and heard appellant's automobile when the front of his car had entered the intersection and that appellant's automobile was travelling at that time at the rate of sixty or seventy miles per hour. That at that time appellee called to her husband to "look out", and thereupon Mr. Hayes accelerated the speed of his car. In the opinion of appellee, appellant's car was about seventy-five to one hundred feet away when she first saw it and was travelling about sixty miles an hour. Donald Garcia, the driver of appellant's

car, testified that he was a medical student at Northwestern University, twenty-five years of age and on August 16, 1934 was driving for Dr. Andrew Ryan. He further testified that when he was about one hundred and seventy-five feet west of the intersection he was driving his car between thirty and thirty-five miles per hour and that it was at this time that he first observed the Hayes car as it approached the intersection. That the Hayes car, at that time, was fifty or sixty feet north of the intersection and travelling at the rate of twenty or twenty-five miles per hour. Garcia further testified that the Hayes car had not proceeded more than seven or ten feet from the time he first observed it before it started to slow down and that when it started to slow down it was forty-four feet from the middle of the intersection. That when the Hayes car had reached a point thirty-six feet from the center of the intersection, it was going between fifteen and twenty miles per hour. That when it had reached a point thirty feet from the intersection, it was going ten to fifteen miles per hour and continued into the intersection at about that rate of speed. Garcia further testified that when he first saw the Hayes car he took his foot off the gas accelerator, but that there was a slight decline so that his car did not slow up but very little, if at all, and that it continued at approximately thirty to thirty-five miles per hour until it reached a point ten feet from the intersection, when appellant's car was at this place, that is ten feet from the intersection. Garcia testified that the Hayes car "was just going over the road" and that he, Garcia, applied the brakes to his car and that his car slid for about seven feet before his car hit the Hayes car, and that after the impact, his car stopped immediately but was carried by the impact ninety degrees to the right. That the Hayes car continued for some distance and ~~was~~ slightly toward the east and then turned over on its left side. Garcia further testified that a few seconds after he first observed the Hayes car, he noticed that Mr. Hayes

hesitated at the crossing, meaning that the speed of the Hayes car "slowed up enough to where my own judgment told me to go on ahead that he was going to let me by and the next thing I knew I was going on top of the road, and the next thing I thought was that I could still get past and that he slowed up again and I was almost on top of it and I put on my brakes and I slid almost seven feet and I was into his side".

The evidence further discloses that both roads were graveled and in fair condition on the day in question and the gravel portion of each was fourteen or sixteen feet in width. The day was clear and the roads were dry. There were no stop signs or signals of any kind at the intersection and appellee and her husband were both familiar with the locality and with the intersection. Various photographs showing the intersection, the highways as they approach the intersection and various views of appellee's car were admitted in evidence and from the record we have examined these several photographs.

It is insisted by appellant that his automobile, under the law, had the right of way over the automobile in which appellee was riding at the intersection and that therefore there can be no recovery. The statute of our State, Smith-Hurd Ill. Rev. Statute, Chap. 95½, Paragraph 165, provides: "Except as hereinafter provided motor vehicles travelling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left". And in connection with this contention, counsel for appellant calls our attention to the cases of Singer v. Cross, 257 Ill. App. 41, and Riddle v. Wansager, 254 Ill. App.68. We have examined those cases, but do not believe they are applicable to the facts as disclosed by the evidence in this record. Counsel

for appellant insists that the evidence conclusively shows that the automobiles involved in this collision reached the intersection at approximately the same time. We do not think the evidence so shows. When Garcia first saw the car in which appellee was riding, it was only fifty or sixty feet north of the center of the intersection and travelling at the rate of twenty or twenty-five miles per hour while the appellant's car was then approximately one hundred seventy-five feet west of the center of the intersection. Garcia himself testified that when he was ten feet west of the center of the intersection, the Hayes car was just going over the road. The Hayes car reached the intersection first and what was said in Heidler Hardwood Lumber Co. v. Wilson, 243 Ill. App. 89, is applicable. "It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection at his right without regard to the distance that vehicle may be from the intersection when it reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed, such, that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion the latter car is not one 'approaching from the right' within the meaning of the statute so as to require such driver to stop or yield the right of way." It was also stated in Dalmon v. Wilson, 237 Ill. App. 286, at page 288: "While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance approaching cars may be from the point of intersection". In the instant case the driver of the

car in which appellee was riding had a right to assume that appellant's car was being driven with due care. The evidence discloses that both Mr. and Mrs. Hayes looked toward their right and saw no car in the highway and that they could see for a distance of several hundred feet west of the intersection. They therefore were warranted in concluding that there was no danger in their proceeding to enter the intersection and that they had entered the intersection when they again looked and for the first time saw appellant's car approaching the intersection at a speed, in the opinion of Mr. and Mrs. Hayes, of at least sixty miles per hour and at a speed in the opinion of Mr. Garcia of thirty or thirty-five miles per hour. The trial court had a superior advantage over this court in determining where the truth lay and from an examination of all the evidence in this record, we are inclined to the opinion that the findings of the trial court, that the driver of appellant's car was negligent and that appellee was not guilty of contributory negligence, are sustained by the greater weight of the evidence.

It is next insisted that the court admitted improper testimony upon the trial. The testimony complained of is that of Dr. Lucas, Dr. Yonkers and Dr. Smith, who were permitted by the trial court to express their opinions as to the permanency of appellee's injuries, and also that there was a causal relation between the accident in question and the injuries which appellee claimed to have suffered as a result of the collision. It is also urged that the trial court erred in permitting appellee to answer the question; "Will you please state whether or not there was any difference in the position of your womb before and after the accident?" Her answer was: "I know it was down."

[illegible]

[illegible]

[illegible]

The record discloses that competent medical witnesses who examined appellee following the injuries testified without objection that the injuries appellee sustained were internal and of a permanent nature, and in our opinion the objections of counsel for appellant to the questions propounded to Dr. Lucas, Dr. Yonkers and Dr. Smith, the physicians, or to appellee were properly overruled. Wolzek v. Public Service Co., 342 Ill. 482; Kimbrough v. Chicago City Railway Co., 372 Ill. 71; Metz v. Yellow Cab Co., 248 Ill. App. 609.

It is finally insisted that the judgment is excessive. The evidence discloses that appellee was thirty-five years of age at the time of the accident, the mother of three children and that her husband is a farmer and she was engaged in performing the usual house work of such a household. The record further discloses that she incurred doctors', nurses' and hospital bills aggregating $3,243.00, and that she has been practically incapacitated since the accident. From all the evidence we are unable to say that the judgment is excessive. There is no reversible error in the record and the judgment of the Circuit Court of Ogle County is therefore affirmed.

JUDGMENT AFFIRMED.

The events claimed and accepted public rights are the exercised appeals following the injurious behavior without interfere with the injurious conditions constitute non-interest and of a contract nature, and in our opinion the objectives of control in accordance to the creation government as to, cause, in, Vesting and by-laws, the objections, or to original were properly initial. Wilson v. Public Service Co., 292 III, 1931 Sherman v. Chicago City Railway Co., 272 III, 41; Ortt v. Fitzhugh Co Co., 240 III. 439, 442.

It is finally insisted that the judgment is excessive. The evidence discloses that plaintiff's damages consist of his time at the hospital, the money of these injuries and loss that resulted in a fracture and was required in restricting the usual duties such of such a hospital. The record further discloses that the insurance carrier, surety and insured bills aggregating $2,243.00; and that the has been practically incapacitated since the accident. From all the evidence we are unable to say that the judgment is excessive. There is no reversible error in the record and the judgment of the circuit Court of Cook County is accordingly affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 2011 AGENDA NO. 28

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1935.

JOHN PETERSON, Appellee, vs. KARL J. JONES and CLEO JONES, Appellants.	APPEAL FROM THE CIRCUIT COURT OF WHITESIDE COUNTY.

DOVE, J.

John Peterson, while riding as a guest in an automobile driven by August Karl, was injured when the car in which he was riding came into collision with an automobile being driven by Cleo Jones. He brought suit against Cleo Jones and her husband, Karl J. Jones, resulting in a verdict in his favor for $1500.00, upon which judgment was rendered and the record is here for review.

The evidence discloses that the accident occurred at an intersection of a gravel road and Route 88, about two miles south of Rock Falls. August Karl was driving his Ford Coupe south on State Route 88, accompanied by Peterson and upon arriving at the intersection of the gravel road, Karl decided to turn around and go back north to Rock Falls, and in order to do this, he turned to the west off of the pavement and then turned east across the pavement in order to make a "U" turn. It is the contention of appellee that

the car in which he was riding after making the turn, then proceeded north on the right or east side of the pavement and that the car driven by appellant Glee Jones, which was going in a southerly direction, ran into the left or west side of the car in which appellee was riding. It is the contention of appellants that the car in which appellee was riding turned off the pavement in front of them to the east and then came back to the pavement and started directly across the pavement, in front of appellant's car to the west, and it was at this time that appellant's automobile, travelling in its own traffic lane, struck the other car on its right side, causing it to turn over.

The evidence is conflicting and inasmuch as the judgment must be reversed for the reason hereinafter stated, it is unnecessary for us to review the testimony of the several witnesses.

The first witness called by appellee was Jesse G. Jaquet, who testified that the accident occurred about two o'clock on Sunday afternoon, April 29, 1934. That Route 88 runs north and south and the gravel road intersects it running straight east and west and the place of intersection is commonly called Golder's corners. That the witness was driving an Essex coach south on Route 88, going about thirty miles per hour and noticed the Ford Coupe in which a pellee was riding in front of the car which the witness was driving. That there is a gas station on the east side of the hard road about a quarter of a mile north of the intersection and that about forty rods north of the gas station, appellant's car, driven by Mrs. Jones, passed the witness going at a speed of about sixty miles per hour. That the car in which appellee was riding was east of the black center line and going north at the time of the collision, and the car of appellants was astride the black line and struck the car in which appellee was riding on the left hand side, causing it to turn around and upset. Upon cross examination this witness was handed a paper

marked for identification as defendant's Exhibit No. 1, and the witness identified his signature thereon. After the cross examination was concluded, Mr. Wing, one of appellee's counsel, sought to re-examine the witness and the record discloses that the following took place. Mr. Ludens represented appellants:

"MR. WING: Q. I notice at the foot of this paper this is a signature H.R.Johnson witness.

"MR. LUDENS: I object to that. The statement is not in evidence.

"THE COURT: Objection sustained.

"MR. WING: He has examined enough about the contents of this instrument.

"THE COURT: No. He has not.

"MR. WING: Q. Is that the man that stands over there who brought this instrument to you?

"MR. LUDENS: We object to that as immaterial.

"THE COURT: Objection sustained.

"MR. WING: Q. Mr. H.R.Johnson - - -

"MR. LUDENS: We object to the remarks of counsel and move they be stricken.

"THE COURT: Sustained.

"MR. WING: Q. You know Mr. H.R.Johnson?

"MR. LUDENS: We object to that as immaterial.

"THE COURT: Objection sustained.

"MR. WING: Q. This man that has been pointed out here, when did he first come to see you about this instrument?

"MR. LUDENS: I object to that as immaterial.

"THE COURT: Objection sustained.

"MR. WING: If your Honor please, - - -

"THE COURT: Objection sustained.

"MR. WING: Q. You say that this man that brought this typewritten paper to you was there before?

"MR. LUDENS: We object to that as there has been nothing said about that.

"MR. WING: There has been.

"THE COURT: Objection sustained.

"MR. WING: And he said that the statement was written out in long hand and then was brought back and that he didn't read it but he signed it.

"MR. LUDENS: We object to the remarks of counsel and move they be stricken.

"MR. WING: That is exactly what he said about it, and we are entitled on redirect to that cross examination.

"Q. Now this paper marked 'Defendant's Exhibit 1' was brought back to you by this man after he was first there and saw you, wasn't it?

"A. Yes, sir.

"Q. How long was he there before that?

"A. He was there on a Tuesday night after the accident on Sunday.

"Q. And that would be two days after the accident he was there?

"A. Yes, sir. He hunted me two days before he found me.

"MR. LUDENS: We object to that and move that be stricken.

"THE COURT: Objection sustained.

"MR. WING: Q. He was there two days after the accident? Was Mr. or Mrs. Jones there?. A. No, sir.

"Q. And then he asked how this accident happened?

"MR. LUDENS: I object to that.

"THE COURT: Objection sustained.

"MR. WING: We have a right to go into this if they are going to swap instruments over night. They took it in long hand, and

when he brought it back in typewriting we ought to know about it. This witness will not be on the witness stand when they attempt to offer it, if they do attempt to offer it, and we are entitled to know all of the raw matter and surrounding circumstances of this paper that they had marked for identification.

"THE COURT: Not on the contents of the document before it is offered.

"MR. WING: I am not asking a word about its contents. He has brought out, or did on cross examination by his own question, that this is not the paper that was written out in long hand when this man Johnson was there two nights after the accident, Now, we are - - -

"THE COURT: As to the matters he brought out you may cross examine.

"MR. WING: That is all I desire to do.

"THE COURT: Just as to those matters.

"MR. WING: That is all I shall go into.

"Q. Did you sign this paper he wrote out, that paper he wrote out two nights after the accident?

"A. I did.

"Q. And then how soon did he come back with this typewritten paper marked 'Defendant's Exhibit 1' for identification?

"A. I think that was on a Saturday, if I am not mistaken; two or three days later.

"Q. Did he say anything as to whether he had written it out on the typewriter, or anything like that?

"MR. LUDENS: We object to that as immaterial.

"MR. WING: Q. What did he say?

"MR. LUDENS: We object.

"MR. WING: This goes to the subject matter that he brought out.

"THE COURT: You mean about this instrument?

"MR. WING: Yes. About this instrument.

"THE COURT: He may answer that.

"THE WITNESS: A. He said that he typed it out so that the insurance company - - -

"MR. LUDENS: We object to that.

"THE COURT: Objection sustained.

"MR. LUDENS: That is all you wanted to get before the jury.

"MR. WING: It is not.

"MR. LUDENS: Well, it is.

"MR. WING: It is not.

"MR. LUDENS: Just a minute.

"MR. WING: Q. Well, then did you sign this after - - -

"MR. LUDENS: I would like to have the jury excused. I want to make a motion right now.

"THE COURT: The jury may stand aside.

"MR. WING: I object to that, your Honor.

"THE COURT: The jury may stand aside.

"MR. WING: I desire to be heard on that motion.

"THE COURT: That is exactly it. The jury may stand aside.

(Whereupon the jury retire from the court room and the following proceedings were had in the ABSENCE OF THE JURY:)

"THE COURT: State your motion first.

"MR. LUDENS: I desire to make a motion that a juror be withdrawn and my reason is that the witness has injected in here now that there is an insurance company. He had no business mentioning it.

"MR. WING: Nobody mentioned it.

"MR. LUDENS: This man just mentioned insurance company. Of course he got it before the jury. That is what he intended to do. That is what he is here for.

"THE COURT: Whether he intended to or not - - -

"MR. LUDUNS: Anyhow he did it. I make a motion to strike the answer and move to withdraw a juror at this time for the reason that the witness has injected the matter of an insurance company being involved in this case. There is no insurance company as plaintiff or defendant.

"THE COURT: The motion to strike is allowed. The motion to withdraw a juror is denied."

The record further discloses that this exhibit was subsequently introduced in evidence by appellants and portions thereof read to the jury and is a statement made by the witness Jaquet as to how the accident occurred. It appears to have been witnessed by H.R.Johnson and Jaquet's testimony discloses that he first saw Johnson on Tuesday night after the accident on Sunday, that Johnson wrote the statement and on the following Saturday came back with Exhibit No. I, which was typewritten and Jaquet signed it. Counsel's inquiries upon re-direct examination were improper and the court consistently sustained repeated objections thereto, but counsel for appellee persisted and finally inquired of the witness what Johnson told him about the statement, and it was then that the witness replied that he, Johnson, said that "he had typed it so that the insurance company - - -" and at this point an objection interrupted him and his sentence was not finished. From a reading of this record, we can not escape the conclusion that this statement, although it was promptly ordered stricken from the record by the court, was made because of the insistence of counsel for appellee in pursuing a course of improper conduct. Whether counsel's purpose in making these inquiries was to bring to the attention of the jury that an insurance company was interested in ascertaining the facts in connection with the accident or not is immaterial. In justification of his inquiries, counsel for appellee insist that he was endeavoring to inquire into the matter

of the interchange of the typewritten statement for the handwritten statement, and that appellee should not be penalized because the witness made an unresponsive and inadvertent answer. In support of their contention that the statement of the witness was harmless, our attention is called to the cases of Spree v. Sussman, 264 Ill. App. 528; Smallen v. Anderson, 252 Ill. App. 541; Williams v. Consumers Co., 352 Ill. 51; Colorado Coal Co. v. Swan, 227 Ill. 586; Runyan v. Bland, 264 Ill. App. 265, and Wrisley Co. v. Burke, 203 Ill. 250. We have examined these cases and also Appel v. City Railway Co. , 259 Ill. 561; Bishop v. Chicago Junction Ry. Co., 229 Ill. 63; McCarthy v. Spring Valley Coal Co., 252 Ill. 472; Emery Dry Goods Co. v. De Hart, 130 Ill. App. 244; Turner v. Lovington Coal Mining Co., 156 Ill. App. 60; Bunch v. Abbott, 236 Ill. App. 33 and Mither v. Jeoffrey, 359 Ill. 372, cited by appellants.

In our opinion this statement of the witness Jaquet was well adapted to intimate to the jury that appellants were insured against liability and calculated to influence and prejudice the jury against appellants and therefore, in view of the conflicting testimony found in this record, we believe the cause should be submitted to another jury.

The judgment of the Circuit Court of Whiteside County is reversed and this cause remanded for another trial.

REVERSED AND REMANDED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

Abstract
Filed - June 9, 1936.

Gen.No.8958- Abstracts & Briefs of Appellant withdrawn by order of Court.

PUBLISHED IN ABSTRACT

Erma Templeman, Plaintiff-Appellant, v. U. G. Usher and Nick Kish, Defendants-Appellees.

Appeal from Circuit Court of Sangamon County.

JANUARY TERM, A. D. 1936.

Gen. No. 8958

283 I.A. 652

PER CURIAM:

In the Matter of the Petition of Erma Templeman for citation for contempt of this court against G. G. Ginnevan, U. G. Usher and Nick Kish, respondents.

And now comes on for hearing the petition of Erma Templeman asking that a citation issue, directed against G. G. Ginnevan, U. G. Usher and Nick Kish, requiring them to show cause, if any they have, why they should not be found in contempt of this court and punished therefor, for their part in filing suit on an appeal bond in the above cause and causing said suit to be tried in a Justice of the Peace Court and taking an appeal to the County Court of Sangamon County from the judgment of said court and for violating Rules 19 and 34 of this court and the law as applied to rehearings in this court.

It appearing from the record in this cause that judgment was entered in the circuit court of Sangamon County on May 13, 1935, against said Erma Templeman and in favor of U. G. Usher and Nick Kish, and that on motion of said Erma Templeman an appeal to this Court was allowed upon her giving a bond in the penal sum of $750.00 within 20 days, which time was extended by the court and a bond filed and approved by said court on July 5, 1935.

The transcript of the record, abstract and brief in said cause were duly filed, and on October 1, 1935, an order was entered dismissing said appeal for failure of appellant to file notice of appeal in 90 days. Said cause is now pending in this court on a petition for rehearing.

On October 2, 1935, G. G. Ginnevan, attorney for U. G Usher and Nick Kish, defendants in said suit, commenced a suit on said bond in a Justice of the Peace Court, and failing to recover on the bond took an appeal to the County Court of Sangamon County, which appeal was dismissed before the cause came on for trial.

The stay of execution of the judgment was caused by the order granting the prayer for an appeal and the giving and approval of the bond by the circuit court of Sangamon County and not by any action of the Appellate Court of the Third District of the State of Illinois.

Respondents, by their action in suing on the bond, are not in contempt of this court for a violation of any of its orders and the prayer of the petition for citation must be denied.

Same v. Carrell Biggs.

Same v. Gale McMillin.

Same v. Fred Adair.

283 I.A. 652

Same v. Omer Biggs.

Same v. Roy Gunn.

Same v. Herschel Biggs.

Same v. Ernest Fortner.

Same v. William Cain.

Same v. Pern Cooley.

Appeal from the Circuit Court of Coles County, Illinois.

October Term, A. D. 1935.

Gen. No. 8915 **Agenda No. 4**

Mr. Justice Davis delivered the opinion of the Court.

On July 23, 1934, separate complaints were filed by John Anderson, chief of police of the city of Charleston, with D. Laughlin, police magistrate of said city, charging appellants and twenty other persons with aiding, assisting and encouraging a breach of the peace in violation of Section 3 of the Misdemeanor Ordinance of said city. The only persons named in said complaints and interested in this appeal are the thirteen appellants.

The defendants named in said separate complaints including the appellants appeared before the police magistrate in person and by attorneys and together with the plaintiff, the city of Charleston, entered into an agreement in writing, by the terms of which it was stipulated, among other things, that each of said cases was to be considered as a separate case so that the

PUBLISHED IN ABSTRACT

City of Charleston, Illinois, a Municipal Corporation, Appellee, v. Harold Davidson, Appellant.

Same v. Glen Shriver.

Same v. Harry Ray.

Same v. Dillard Hill.

Same v. Carrell Biggs.

Same v. Gale McMillin.

Same v. Fred Adair.

Same v. Omer Biggs.

Same v. Roy Gunn.

Same v. Herschel Biggs.

Same v. Ernest Fortner.

Same v. William Cain.

Same v. Pern Cooley.

283 I.A. 652

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OCTOBER TERM, A. D. 1935.

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guilt or innocence of each of the defendants could be determined separately, and that a jury selected to try the cause should find a separate verdict in writing as to the guilt or innocence of each defendant; that the evidence be taken as to each of said cases at one time and submitted to the jury and that a separate verdict shall be received as to each defendant, and that the verdict so rendered shall have the same effect as though each defendant had been tried separately.

A jury was selected and the cause tried and separate verdicts were rendered as to each of said defendants, and appellants were found guilty and the amount of their fines fixed by the verdict of the jury.

The transcript filed in the office of the clerk of the circuit court of Coles county is as follows:

The City of Charleston,
Plaintiff,
v.
Harold Davidson, et al,
Defendant.

July 23, 1934. Complaint filed by chief of police, charging Harold Davidson, et al, with violating section 3 of the Misdemeanor Ordinance. Warrant ordered. Defendant arrested and brought into court. Cause continued until July 24, 1934, 3:30. Defendant released without bond for appearance July 24, 1934. Plea of not guilty entered by defendant who is in court in person and by his attorney, Jacob Berkowitz. Cause set for hearing Saturday, July 28, 1934, at 1:00 p. m. Venire for jury ordered issued and delivered to Horace McIntyre, a constable, to serve. It is agreed that all these cases shall be consolidated.

On July 31, 1934, at 9:00 o'clock, comes plaintiff by its attorney and the defendants in their own person and by their attorney for each of the defendants in a plea of not guilty to the complaint charged against each of them. Thereupon the parties proceded to select a jury. The jury having been accepted by each of the parties was thereupon sworn in accordance with the law. Plaintiff proceeded to introduce testimony in its behalf, which was continued until August 2, 1934, and plaintiff thereupn rested its case. The defendant then proceeded to introduce evidence as to its behalf and rested its case on August 4, 1934. Counsel argued the case on behalf of plaintiff and the defendants and the case was submitted to the jury for consideration.

The jury returned their verdict into open court, wherein there was a separate verdict as to each of the defendants and their verdicts were as follows:

The jury found the defendant, Harold Davidson, guilty and assessed the fine at $87.50; found Glen Shriver guilty and set the fine at $65.00; found the defendant, Harry Ray, guilty and assessed a fine of $25.00; found Dillard Hill guilty and set a fine at $20.00; found Carrell Biggs guilty and set the fine at $17.00; and found Gale McMillin, Fred Adair, Omer Biggs, Roy Gunn, each guilty, and assessed a fine against each of them for $15.00; found Herschel Biggs guilty and assessed a fine of $13.00; found Ernest Fortner and William (Bill) Cain each guilty and assessed a fine of $10.00 each; found Pern Cooley guilty and assessed a fine of $8.00 and found the defendant, Oscar Stewart, guilty and assessed a fine of $2.50. The jury also returned separate verdicts for Frank Fletcher, Richard (Dick) Calhoun, Roy Kimberlin, Frank Kackley, Orville Day, Roy Reed, Eugene Nixon, John Bates, Joe Wuersch, Wayne Owens, Clifford McNamer, Paul Waltrip, and each of them, not guilty.

"Thereupon the court received said verdicts of the jury and discharged them from further service, with thanks of the court. Thereupon consideration of the said verdicts the court entered a judgment against each of the defendants who were found guilty as above stated for the amount of their fines as fixed by the jury and assessed the costs against each of said defendants so found guilty in the sum of $25.70 and thereupon rendered a separate judgment in favor of the city of Charleston against each of the defendants so found guilty for the amount of their respective fine plus their $25.70 costs."

Thereupon the defendants who were found guilty as above mentioned each pray an appeal to the circuit court of Coles County, Illinois. There was also filed separate appeal bonds by each of said appellants and said cause was docketed in the circuit court as one consolidated cause and only one transcript was filed.

Each appellant entered his special appearance and moved the circuit court to dismiss the case as against him on the ground that the court was without jurisdiction because no judgment had been entered against him in the police magistrate's court or transcript filed showing a judgment.

The motion was overruled as to each defendant and the defendants then each moved the court to dismiss the appeal as to him, which motions were overruled.

The court called the cases for trial and the appellants each refused to plead and objected to a trial; and thereupon a plea of not guilty was entered for each of said defendants by the court. A jury was impaneled and evidence taken as to each of said cases against each of said defendants. Whereupon the jury retired to consider of their verdict and thereafter returned into open court a separate verdict as to each defendant and finding each of appellants guilty and fixing the amount of their fines.

Previous to the time that said cause was called for trial in the circuit court the City of Charleston and each of the appellants entered into a stipulation, by the terms of which it was, among other things, stipulated that there are thirteen separate and distinct cases here involved, each defendant's case being a separate case under the complaint filed by the City of Charleston for the violation of a city ordinance as disclosed in the records of this case; that each of said cases is to be considered as a separate and distinct case and has been so considered from the institution of the same and throughout the proceeding; that all of said cases were by agreement for the purpose of convenience, economy and to avoid a multiplicity of trials consolidated for the purpose of taking evidence and having the same jury determine each case in the police magistrate's court, and that thereafter, for the same purpose and reasons, were consolidated and designated as one case in the circuit court; that in the event the City of Charleston desires to proceed to a trial of each and all of said cases in the circuit court that the defendants, while not consenting thereto and at all times objecting under limited appearance to the jurisdiction of the court to try said cases, will raise no objection because said cases were consolidated and tried as one for the purpose of convenience and economy in the taking of the evidence all at one time and before the same jury.

It is further stipulated between the parties that in as much as the defendants are standing upon their respective motions as made by each of them, both to dismiss their respective cases and respective appeals for want of jurisdiction, that if they desire to appeal from the judgment of the court they may do so either severally or collectively, and in the event they do so collectively all of said appeals in said respective cases

may be consolidated in one appeal and one appeal bond given.

Separate motions by each appellant in arrest of judgment were overruled by the court and a separate judgment was entered against each appellant on the respective verdicts of the jury and for costs.

It is contended by appellants that the circuit court was without jurisdiction to hear or determine said case because there was no valid judgment entered by the police magistrate, and for that reason the court erred in overruling appellants' motion to dismiss the respective appeals for want of jurisdiction. The same technicality and formality is not required in proceedings before a justice as in suits before courts of record. *Borrett* v. *Petry,* 148 Ill. App. 622. When the entire record of the police magistrate is read together we think it sufficient to show judgments against appellants.

A judgment which shows the relief granted in whose favor and against whom rendered, the amount of the judgment and that it was rendered by the court, contains all of the necessary elements of a valid judgment. *People* v. *May,* 198 Ill. App. 625.

The transcript of the police magistrate filed in the office of the clerk of the circuit court of Coles County shows that complaints were made by the chief of police charging Harold Davidson, et al, with violating section 3 of the Misdemeanor Ordinance of said city, that each of the defendants in their own proper person and by their attorneys entered a plea of not guilty to the complaint charged against each of them, that a jury was selected and sworn in accordance with the law, that evidence was introduced by both plaintiff and defendants, that the cases were argued in behalf of plaintiff and defendants, and was submitted to the jury and that the jury returned their verdict into court finding each of said defendants guilty and fixing the fines against each of said defendants separately, and that the verdicts of the jury were received by the court and that the court entered judgment against each defendant found guilty in the amount of the fine as fixed by the jury and assessed the costs against each of said defendants so found guilty in the amount of $25.70, and rendered separate judgments in favor of the City of Charleston against each defendant so found guilty for the amount of the separate fine plus their $25.70 costs.

The judgments, while informal, show the relief granted, in whose favor and against whom the judg-

ments were entered, the amounts of the judgments, and that they were rendered by the court and contained all of the necessary elements of a valid judgment. The judgment of the circuit court of Coles county is therefore affirmed.

Affirmed.

(Seven pages in original opinion.)

14 (65805)

Opinion filed January 17-1936

PUBLISHED IN ABSTRACT

William L. O'Connell, Receiver of First State Bank of Findlay, Illinois, Appellee, v. J. E. Dazey, Appellant.

Appeal from the Circuit Court of Shelby County, Ill.

OCTOBER TERM, A. D. 1935.

283 I.A. 652

Gen. No. 8924 **Agenda No. 13**

MR. JUSTICE DAVIS delivered the opinion of the Court.

A judgment by confession was taken by Appellee, William L. O'Connell, Receiver of the First State Bank of Findlay, Illinois, in the Circuit Court of Shelby County, for the sum of $5,681.39 and costs.

A motion was made by appellant to open up the judgment and to permit the defendant to answer the complaint and staying execution and preserving the lien of the judgment, on the grounds that appellant had a good defense to the whole of appellee's demand upon the merits. That there was and is a total want of consideration for each of the three notes, upon which judgment was taken, and that the bank did not give or furnish appellant anything of value whatsoever for said notes, either in money, credit, forbearance or anything either of value or without value.

The affidvait in support of the motion made by appellant stated that there was no consideration for the three notes on which judgment was confessed; that said notes were not given for money, credit, forbearance or for the benefit of defendant or of any other person whatsoever, but were received by the First State Bank of Findlay, Illinois, for absolutely nothing, and that appellant received therefor absolutely nothing, either of value or without value for said notes.

That the First State Bank of Findlay, Illinois, by its receiver, is an original holder of said notes and is not an innocent purchaser for value, and was at all times fully advised and knew that said notes were given by appellant without any consideration whatever. That said bank, the payee of said notes, and this defendant (appellant) received no consideration or anything else on account of the execution of said notes and no one for him received any such consideration or anything else, and that said notes were not executed

for the benefit of any third party or for forbearance.

The court denied the motion of appellant to open up said judgment and this appeal was taken. The pleadings consist of a complaint, the notes sued upon, an affidavit by C. E. Walker, Deputy of William L. O'Connell, Receiver, that the signatures appearing on the notes and purporting to be the signatures of J. E. Dazey are the genuine signatures of said J. E. Dazey, and that he is still alive, and a cognovit confessing judgment upon the notes.

The question presented for determination is whether the circuit court erred in refusing to open up the judgment on the showing made and grant leave to appellant to plead.

From the record in the case it appears that the notes were given for the accommodation of the First State Bank of Findlay, Illinois, and that appellant received no consideration of any kind for the giving of the notes. Under our Statute an accommodation party is only liable to a holder for value. He is not liable to the party accommodated.

The notes were payable to the First State Bank of Findlay, Illinois, and the question is whether the Receiver of said Bank, when he took charge of the assets of the bank, is in any better position to recover on the notes than the bank.

This court held in the case of *McComb* v. *Jacobs*, 256 Ill. App. 141, that unless the notes are given to accomplish in some manner a fraud or are accepted by the bank for some fraudulent purpose, the Receiver is in no better position than the bank was. The record is entirely silent as to the purpose of the giving of the notes or the receiving of the same by the bank and we cannot presume that the transaction was fraudulent.

We are of opinion that a sufficient showing was made by appellant to authorize a court to open up the judgment and grant leave to plead and that the motion should have been sustained by the court.

The judgment of the Circuit Court of Shelby County is reversed and the cause remanded with directions to grant the motion of appellant to open up the judgment and grant leave to plead.

Reversed and remanded with directions.

(Three pages in original opinion)

14 (65865)

Opinion filed January 17-1936

PUBLISHED IN ABSTRACT

M. A. Morrison, Plaintiff-Appellant, v. Mary E. Watson, Defendant Appellee.

Appeal from the Circuit Court of Coles County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8931 **Agenda No. 16**

MR. JUSTICE DAVIS delivered the opinion of the Court.

M. A. Morrison recovered a judgment in the circuit court of Coles county on October 13, 1897, in an action of assumpsit for $1,528.00, damages, and $7.50, costs of suit, against George M. Watson and Mary E. Watson. On September 19, 1933, she sued out a writ of *scire facias* to revive said judgment as against Mary E. Watson, surviving defendant.

In the *scire facias* proceeding defendant filed a plea of the Statute of Limitations and plaintiff replied that the defendant, one year after the judgment was rendered, departed from the state of Illinois and resided in the state of Indiana until May 1, 1933, and that plaintiff's cause of action accrued within twenty years after defendant's return. Defendant demurred to the replication, which was overruled by the court, and the defendant electing to stand by her demurrer, the court found the issues for the plaintiff and entered a judgment on January 10, 1934, and ordered that the judgment rendered on October 13, 1897, stand in full force and effect and awarded execution.

At the June Term, 1934, of said court the defendant, Mary E. Watson, made a motion supported by affidavits to vacate and set aside the judgment of revival entered on January 10, 1934, on the ground that the judgment of date October 13, 1897, was satisfied of record by the plaintiff on September 28, 1912; that the payment of said judgment was not made by defendant, but by a stranger to the record, and the defendant was never informed thereof until more than thirty days after said judgment of revival was entered and until after the expiration of the term of court at which said judgment of revival was entered.

On October 27, 1934, the court set aside the judgment of revival and gave leave to defendant to file additional answers.

Appellant insists that the court erred in vacating the judgment of revival. No appeal was taken from that judgment, and the question as to whether the court erred in setting aside the judgment of revival is not before us.

A motion to correct errors in fact committed in the proceedings in any court of record provided for by section 72 of the Civil Practice Act, being in the nature of a writ of error, *coram nobis*, is the commencement of a new suit at law to recall or reverse the judgment, and the motion is plaintiff's declaration and new issues are made up and that suit is independent of the proceeding in which the judgment sought to be set aside was rendered and an entirely different suit at law. *Harris* v. *Chicago House Wrecking Co.*, 314 Ill. 500. *Domitski* v. *American Lindseed Co.*, 221 Ill. 161.

Section 72 of the Civil Practice Act is Section 89 of the Practice Act of 1907, and the judgment entered in the proceeding under that act was a final judgment in which an appeal would lie. The same construction must be placed upon Section 72. Section 74 of the Civil Practice Act provides that every order, determination, decision, judgment, or decree, rendered in any civil proceeding, if reviewable by the Supreme or Appellate court of this state by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal.

On October 31, 1934, appellee filed her further answer, in which she alleged payment and discharge of the judgment, to which a reply was filed by appellant denying payment in satisfaction of the judgment. Upon a trial of said cause the plaintiff called the clerk of the circuit court, who produced the Judgment Record of the court, and introduced the record of the original judgment sought to be revived, which was rendered on October 13, 1897, in the case of M. A. Morrison v. George M. Watson and Mary E. Watson for the sum of $1,528.00 and costs, and thereupon rested her case. Mr. Kelly, attorney for the defendant, admitted that the Statute of Limitations had not run as a matter of law.

On behalf of the defendant there was offered page 101 of Volume 12, Judgment and Execution Docket of the court, and the same was admitted in evidence, and is as follows:

"M. A. Morrison v. George M. Watson and Mary E. Watson.	Action, Assumpsit. Judgt. rendered Oct. 13, 1897, against defendants. Das. 1528.00.

Oct. 29 pg. 210.
Fee Book 38, page 313: Recd. This Judgment
Interest & Costs in full this 28th day of Sept.
A. D. 1912. M. A. Morrison."

Numerous witnesses were called on each side to testify to the signature M. A. Morrison appearing in said record, including Bert D. Cole who was clerk of the circuit court on September 28, 1912, who testified that the entry, "Recd. This Judgment, Interest & Costs in full this 28th day of Sept. A. D. 1912," was in his handwriting but that he had no remembrance of the circumstances under which it was signed. It will be unnecessary to comment upon the evidence as it was conflicting and it was the province of the jury to determine in whose favor it preponderated.

The jury found the issues in favor of the defendant, and the court after overruling a motion for a new trial entered judgment on March 14, 1935, in bar of said action.

Complaint is made of an instruction and it is also contended that the verdict of the jury is against the weight of the evidence.

The instruction, complained of by appellant, reads as follows:

"The court further instructs the jury that lapse of time since the judgment here sued on was rendered in 1897 is a circumstance which you have a right to consider in connection with all of the other facts and circumstances shown in evidence in reaching your decision as to whether, or not, the defendant has shown by a preponderance of the evidence that the said judgment has been paid and satisfied."

An instruction which calls the attention of the jury to a single item of the evidence, which in itself is not conclusive, should not be given. It emphasizes that particular item of the evidence and has a tendency to give it undue weight. It depends largely upon the record in the case as to whether the giving of such an instruction is reversible error.

While the evidence was sharply conflicting it was directed almost exclusively to the question as to whether the signature to the release in the Judgment and Execution Docket was the genuine signature of M. A. Morrison. We have examined the evidence carefully and do not feel that the jury was influenced unduly by the giving of this instruction It was the province of the jury to determine from the evidence whether there had been a payment in satisfaction of the judgment. We are of opinion that the verdict of the jury is not

contrary to the manifest weight of the evidence, and no reversible error appearing in the record of the case the judgment of the circuit court must be affirmed.

Affirmed.

(Five pages in original opinion.)

Opinion filed January 17, 1936.

PUBLISHED IN ABSTRACT

H. B. Boyer, Administrator of the Estate of Toby N. Drollinger, Deceased, Appellee, v. Ralph H. Beekman, Doing Business as Beekman Truck Service and Virgil Dubois, Appellants.

283 I.A. 653

Appeal from the Circuit Court of Champaign County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8942 **Agenda No. 22**

MR. JUSTICE DAVIS delivered the opinion of the Court.

U. S. Route 45 passes through the Village of Tolono, in Champaign county, in a northerly and southerly direction parallel to the Illinois Central tracks. At the northerly limits of Tolono said route gradually curves southwesterly for several hundred feet and then curves back south again. There are two intersecting village streets running in an easterly and westerly direction, one of said streets being 1,900 feet north and the other 300 feet north of the scene of the accident hereinafter referred to.

On the west side of this highway and about 300 feet south of the latter intersection is located Sunset Villa, a road house that served beer, liquors, meals and sandwiches, which is located back from said Route 45, and in front of which was a cinder parking space about 45 by 50 feet in dimensions. On the east side of the highway and about opposite to Sunset Villa is located the Groethe filling station.

Toby N. Drollinger, the plaintiff's deceased, was the owner of a taxicab business in Champaign, Illinois. On the evening of January 4, 1935, Virgil Carlton, and Bob Robinson were at Sunset Villa and desired to go to Champaign. They telephoned Drollinger to come and get them. There was some delay in the arrival of Drollinger and about 8:30 p. m. Frank Davidson, the proprietor of Sunset Villa, Virgil Carlton and Bob Robinson got into Mr. Davidson's Chrysler coupe which was facing south in front of the Villa. Davidson drove, sitting on the left side, Carlton in the middle and Robinson on the right hand side. They intended to drive north to Champaign.

Davidson circled his car south and east and approached the pavement and stopped his car about four

feet from the edge of the pavement. He looked in both directions and saw no lights coming from the south but did see two headlights about 200 yards to the north of him. He started across the pavement in a northeasterly direction toward the east side of the pavement. His traffic lane going north was on the east side of the highway. He got to the east side of the pavement traveling from 35 to 75 feet.

Coming from the north at this time was the Chevrolet truck of defendant, Beekman, driven by the defendant, Virgil Dubois. It was a tractor with trailer attached and was about thirty-five feet in length. This truck passed the witnesses, Harold Creamer and his sister, Ruth Creamer, two and one-half miles north of Tolono. Both the car that Creamer was driving and the truck were traveling southward on U. S. 45. Creamer was driving his car about 45 miles per hour from the time the truck passed him until he reached a road leading into Tolono about 1,900 feet from Sunset Villa. He testified the truck was going fifty miles per hour and was gaining on him and when he turned was about five hundred feet ahead of him or about six or seven hundred feet from Sunset Villa.

Davidson testified that when the truck was about seventy-five feet north of him it came over the black line to the east side of the pavement and he turned his coupe to the east, as much as he could, and the truck collided with his car on the east side of the pavement while the front wheels of his car were off in the cinders on the east side of the pavement.

Toby Drollinger had arrived in his taxicab and had parked it just north of the door to Sunset Villa about the time Davidson was turning his coupe around in the cinder driveway. Carlton testified that the Davidson car cross the pavement in a northeasterly direction. That he heard Toby say, "Hey Bob," and just at that time he hopped up on the running board on the right side of the car and the crash came. That Toby Drollinger when he first saw him had hopped up on the front of the running board. The right hand side of the Davidson car at that time was off on the shoulder of the pavement on the east side, the dirt shoulder. The crash came in a fraction of a second after he hopped on the running board. The truck and the car came to rest about seventy-five feet south of the point of impact in Groethe's driveway. The body of Drollinger was seventy-five feet south from where the cars came together in the center of the highway.

The foregoing is the substance of the testimony, and no motion for a new trial was made and as the Appellate Court can consider the question of the sufficiency of the evidence to sustain the verdict only when the question was presented on a motion for a new trial and ruled upon by the trial court, we will not make a more detailed statement of the evidence. *Anderson* v. *Karstens,* 297 Ill. 76. It is just as necessary under the provisions of the Civil Practice Act that a motion for a new trial be made and ruled upon by the trial court in order to give the Appellate court jurisdiction to weigh the evidence in an action of negligence and reverse the judgment of the trial court upon a finding of fact different from that of the trial court, as it was under the provisions of the Practice Act of 1907. *Yarber* v. *C. & A. Ry. Co.,* 235 Ill. 589.

On the trial of the cause the jury returned a verdict for the plaintiff for $3,300.00. Defendants moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence, which motions were overruled by the court. A motion was made by defendants for judgment *non obstante vere dicto,* which was overruled by the court and judgment was entered upon the verdict of the jury, and this appeal followed.

Aside from the contention that the weight of the evidence was not sufficient to warrant the jury in finding the defendants guilty, appellants rely upon the following for a reversal of the judgment.

The court erred in refusing to direct a verdict for the defendants; that there is no evidence that plaintiff's intestate was in the exercise of due care for his own safety, and that the court erred in not permitting Virgil Dubois, the driver of the truck and one of the defendants, to testify.

The argument of appellants is devoted entirely to the question of the weight of the evidence and to the fact that the court erred in refusing to permit the defendant, Dubois, to testify. It has been pointed out that the court is without jurisdiction to consider the weight of the evidence, and we are of opinion that the contention that the court erred in refusing to permit the defendant Dubois to testify is without merit.

Appellants contend that there is an entire lack of evidence in the record to sustain the position that plaintiff's intestate was, at and just prior to the time of the injury, in the exercise of due care for his own safety.

The accepted rule of law upon the question of negligence is, that if one exercises the degree of care re-

quired of a reasonably prudent man under the circumstances he is guilty of no negligence. *Rosenthal* v. *C. & A. R. R. Co.,* 255 Ill. 552. The due care on the part of plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference to be drawn therefrom, tends to show the exercise of due care on the part of deceased. *Thomas* v. *Buchanan,* 357 Ill. 270.

The evidence shows that, at the time deceased hopped upon the running board of the Davidson car, the right hand side of the car was off on the shoulder of the pavement on the east side. There is nothing in the evidence that tends to show that Drollinger knew or could have known that the truck would be driven over onto the east lane of the highway. He had a right to assume that the driver of the truck would obey the law and drive on his part of the pavement.

It is a question of law for the court to determine whether under the facts and circumstances of each particular case there is any evidence tending to prove due care, and if there is such, then the case should be submitted to the jury and the court cannot say, as a matter of law, that plaintiff's intestate was guilty of such contributory negligence as to bar the right of recovery. *Smith* v. *Courtney,* 281 Ill. App. 530.

From the record before us we are of opinion that the court did not err in submitting the case to the jury and in not holding as a matter of law that there was an entire lack of evidence to sustain the position that plaintiff's intestate was at and just prior to the time of the injury in the exercise of due care for his own safety.

Appellants take the position that no motion for a new trial is necessary when a motion *non obstante veredicto* is made; that by the plain provisions of the Act it is necessary for the court on appeal to weigh the evidence and to consider the credibility of witnesses in order for the court to determine whether to enter judgment, or whether to order a new trial in accordance with Sections b and c, Sec. 68, of the Civil Practice Act.

Appellants in their motion for judgment, notwithstanding the verdict, set forth fourteen reasons why such judgment should be given by the court. It contained all the reasons usually incorporated in a motion for a new trial. We will consider this contention of appellants in connection with the alleged error of the trial court in not directing a verdict on their motion at the close of all the evidence.

Section 68, par. 3(a), of the Civil Practice Act, Par. 196 3(a) Ill. State Bar Stats. 1935, gives to either side the right to a judgment notwithstanding the verdict, if either party shall at the close of the testimony, and before the case is submitted to the jury, request the court for a directed verdict in his favor, and where the court reserves its decision thereon, and submits the case to the jury, or after receiving and recording the verdict and before judgment is entered in said case, the court shall decide, as a matter of law, whether the party requesting the directed verdict was entitled thereto.

At common law, a judgment *non obstante veredicto* could be entered only when the plea of the defendant confessed the plaintiff's cause of action, and, in defense thereto, set up insufficient matters in avoidance, which, if found to be true, would not constitute a defense or bar to the action. In such case the plaintiff was entitled to a judgment notwithstanding a verdict found in favor of the defendant. A motion for such a judgment was never permitted upon the part of the defendant. The motion to be made by the defendant for a judgment because of the insufficiency of plaintiff's pleadings was a motion in arrest of judgment.

It appears from a reading of the above Section 68 of the Civil Practice Act that the legislature intended to extend the right to either litigant to make a motion for judgment notwithstanding the verdict. However, this does not give the court the right, as contended for by appellants, to weigh the evidence and consider the credibility of witnesses in order to determine whether to enter judgment or to order a new trial. Neither does such motion take the place of a motion for a new trial. The court can only enter a judgment notwithstanding the verdict when it decides as a matter of law, that the party requesting the directed verdict was entitled thereto. This precludes the court from weighing the evidence in making such decision.

Rule 22 of the Rules of Practice of the Supreme Court clearly indicates that in determining whether to grant a motion for judgment notwithstanding the verdict, the court is required to determine as a matter of law that the party making such motion is entitled thereto.

This Rule reads as follows: "The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases when, under the evidence in the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury."

The Appellate Court in determining whether the trial court committed an error in refusing to direct a verdict in favor of the party against whom the verdict of the jury was rendered or to order judgment notwithstanding the verdict, under the provisions of Sec. 68, par. b and c, cannot weigh the evidence and consider the credibility of the witnesses. It, like the trial court, must determine as a matter of law whether a judgment notwithstanding the verdict of the jury should be entered or not, and whether the trial court was in error in its ruling.

A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. *McCune* v. *Reynolds,* 288 Ill. 188. On considering a motion for an instructed verdict, the trial court has nothing to do with any question as to the preponderance of the evidence or the credibility of the witnesses. The only question which the court has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the declaration. The question of the weight to be given the testimony is a question for the jury. The court cannot weigh the evidence of the plaintiff and defendant in order to determine where in its opinion the preponderance lies. Controverted questions of fact are to be submitted to the jury for its consideration and determination. *McFarlane* v. *Chicago City Ry. Co.,* 288 Ill. 476.

Our Supreme Court in the case of *Chicago City Ry. Co.* v. *Martensen,* 198 Ill. 511, said: "If, as contended by counsel for appellant, the trial court may, at the close of all the evidence, take a case from the jury merely because he regards the clear preponderance of the evidence,—or the overwhelming preponderance of the evidence,—as being in favor of the defendant, then the right of trial by jury is left to the judgment of the court; and no one would seriously insist upon such a rule."

The court has no more authority to weigh and determine controverted questions of fact, in passing upon the question as to whether or not judgment notwithstanding the verdict of the jury shall be entered, than it has in determining the question as to whether a motion for a directed verdict shall be granted.

We are of opinion that the trial court did not err in overruling the motions of appellants for a directed verdict and for a judgment notwithstanding the verdict and that the judgment of the circuit court should be affirmed.

Affirmed.

(Nine pages in original opinion)

14 (65865)

Abstract

.40

Opinion filed January 17, 1936

PUBLISHED IN ABSTRACT

Joseph Passalacqua and Vincent Passalacqua, for the use of John Sansone, Plaintiff, Phillip Passalacqua, Intervenor, Appellant, v. Saline Branch Drainage District, a Corporation, Defendant-Appellee.

283 I.A. 653

Appeal from County Court of Champaign County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8946 **Agenda No. 25**

MR. JUSTICE DAVIS, delivered the opinion of the Court.

On December 15, 1933, the Saline Branch Drainage District entered into a contract with Joseph Passalacqua, as follows:

ARTICLE OF AGREEMENT. made and entered into this 15th day of December, A. D. 1933, by and between the Saline Branch Drainage District, party of the first part, and Joseph Passalacqua, party of the second part,

WITNESSETH: Whereas, the party of the second part is the owner of a complete sawmill equipment, consisting of one fifty-six inch blade together with overhead saw.

WHEREAS, party of the first part desires to lease the said equipment from the party of the second part.

WHEREAS, the party of the second part is willing to lease said equipment to the party of the first part for the following consideration: The party of the second part shall furnish all equipment known as sawmill equipment, and the party of the first part shall pay him rental for same in the sum of four dollars per thousand feet, board measure, for lumber put through, consisting of two and three-fourth to three and one-fourth inch sheeting, one side to be edged and the other to be edged, if necessary, from six to ten inches in width and six to twelve feet in length, as directed. The engineer of the party of the first part will determine what boards shall be double edged.

The party of the first part agrees to pay all expenses of moving said equipment from time to time, and to see that labor is furnished so that said equipment can be used in a workmanlike manner.

Witness our hands and seals this 15th day of December, A. D. 1933.

Saline Branch Drainage Commission, By Commissioners,	H. N. Pell, (Seal.) Fred Thompson, (Seal.) Anna O'Donnell, (Seal.) Party of the First Part. Joseph Passalacqua, (Seal.) Party of the Second Part.

It appears from the testimony of H. N. Pell that he was one of the commissioners of the Drainage District, and that there was due upon the contract at the date of the trial the sum of $407.51; that the sum of $300.00 had previously been paid to Joseph Passalacqua.

It seems that Joseph Passalacqua had run the mill for a time and left and went to St. Louis and his brother, Phillip, then ran the mill. All told the Drainage District became liable to pay the sum of $707.51 for the use of the mill.

John Sansone, for whose use this suit was brought, recovered a judgment against Joseph Passalacqua and Vincent Passalacqua in a Justice of the Peace Court for the sum of $330.00 and costs of suit, taxed at 10.00, on June 20, 1934, upon which an execution was issued and returned not satisfied.

This suit in garnishment was commenced on June 29, 1934, before Mark F. Endicott, a Justice of the Peace of Champaign County; upon the trial of said cause a judgment was rendered in favor of plaintiff for the sum of $451.00, the sum of $340.00 to be paid to John Sansone and the balance to Joe Passalacqua. From this judgment Phillip Passalacqua, who had intervened in said cause, took an appeal to the County court of Champaign county.

Upon the trial of said cause and at the conclusion of the evidence a motion was made on behalf of plaintiff to direct a verdict in favor of plaintiff. The court directed the jury to return a verdict in favor of the plaintiff, and a judgment was entered on the verdict by the court in favor of the plaintiff for the use of John Sansome in the sum of $340.00 and for use of the intervenor, Phillip Passalacqua, for $67.00, and against the Saline Branch Drainage District. From this judgment the intervenor, Phillip Passalacqua, took this appeal.

Numerous errors are assigned, but the argument of appellant is confined to the question as to whether Phillip Passalacqua was entitled to the money due from the Drainage District because it is claimed, after Joe Passalacqua quit running the mill and went to St. Louis, Phillip took charge.

The contract was never assigned or abrogated, and the claim of Phillip Passalacqua is based solely upon the fact that Joe Passalacqua went to commissioner, H. N. Pell, and told him he was going away and that Phillip was capable of running the mill. From the contract it appears Joe Passalacqua was the owner of the mill and the Drainage District wished to lease the same and Joe Passalacqua was willing to lease the mill to the Drainage District. Joe Passalacqua was to furnish the equipment and the district was to pay him as rental the sum of $4.00 per 1000 feet, board measure, for all lumber put through the mill. The Drainage District was to pay all expenses of moving the equipment from time to time and to see that the labor was furnished so that said equipment could be used in a workmanlike manner. There is no evidence in the record that Phillip Passalacqua had any interest whatever in the contract. The fact that he worked in the mill, would not be evidence that he had taken over the contract. The contract was one of rental, and he was in no way interested in it.

Joe Passalacqua testified on behalf of Phillip that Phillip was the owner of the sawmill, although in the contract entered into between him and the Drainage District it was stated that Joe Passalacqua owned the sawmill. Phillip Passalacqua, Intervenor, now contends that he was the owner of the sawmill and that therefore he is entitled to the money due as rent from the Drainage District. Under the terms of the contract the Drainage District owed nothing except the rental and Joe Passalacqua was the person entitled to collect the rental. If Phillip was the owner of the sawmill and entitled to anything for the use of the same he must look to Joe for that. Although the money was all due to Joe Passalacqua, the judgment erroneously awarded $67.00 of the rent due to Phillip Passalacqua, but no complaint is made of the judgment of the court in that regard. We are of opinion that the judgment of the County court of Champaign county should be affirmed.

Affirmed.

(Four pages in original opinion.)

14 (65865)

Opinion filed January 17, 1936.

PUBLISHED IN ABSTRACT

Mary E. Davis, Appellee, v. George J. Kable and Joseph W. Everts, Executors of the Last Will and Testament of Henry C. Kable, Deceased, Appellants.

Appeal from the Circuit Court of Macoupin County.

OCTOBER TERM, A. D. 1935.

283 I.A. 653[3]

Gen. No. 8954 **Agenda No. 28**

MR. JUSTICE DAVIS delivered the opinion of the Court.

Henry C. Kable departed this life testate in 1930, and left him surviving his widow and a number of nieces and nephews. His will was admitted to probate in the county court of Macoupin county, and George J. Kable and Joseph W. Everts qualified as executors thereof. He gave certain real estate and personal property to his wife and gave small legacies to a church and church society and provided that his executors should take charge of the balance of his estate and convert it into cash and distribute it equally among his nieces and nephews. The widows renounced the provisions of the will made for her benefit and a settlement was made with her. His estate consisted of about $100,000.00 in personal property and seven hundred acres of real estate.

Mary E. Davis, the appellee, was one of his nieces and resided in Tippecanoe, Ohio. An order for distribution was entered by the county court, by the terms of which the executors were directed to pay to appellee certain sums of money.

She filed a petition in the county court of Macoupin county alleging that, although distributions had been made from time to time in said estate, nothing had been paid to her and asking the court for a rule on the executors to show cause why her distributive share was not paid to her. The executors answered claiming that appellee was indebted to the estate and for that reason they had not paid her her distributive share.

The basis of their claim was two receipts for $1,000.00 each that were found by the executors in the safety deposit box of Henry C. Kable in a bank at Virden, Illinois. One dated September 27, 1927, and the other April 12, 1928, both acknowledging the receipt of the money from Loa L. Davis, and being

signed by "Feightly Lutheran Home, A. L. Harshbarger, Treasurer."

These two receipts were inventoried by the executors as assets of the estate due from Loa L. Davis, who is now Loa L. Brunsweger, she being a daughter of appellee, Mary E. Davis.

The circuit court decided in favor of appellee and entered an order directing the executors to pay her the sum of $900.00, being the full amount of her share of the money distributed by the executors.

Appellants claim the court erred in finding the $2,000.00 sent by Henry C. Kable to Ohio was a gift of the money to Mary E. Davis, and not a loan, and that the court erred in ordering appellants to pay the $900.00 to Mary E. Davis.

Loa L. Brunsweger, a daughter of appellee, testified that her mother, Mary E. Davis, had received no payments from the executors. That her mother lived in Tippecanoe City, Ohio, with her sister. That her sister owned the property in which they lived; that she had owned the property from 1914 to 1927, and in 1927 she got married and had transferred the property to her sister. When she got the property she placed a mortgage on it to the Feightly Lutheran Home for $4,750.00. She received a check from Henry C. Kable in September, 1927, for $1,000.00, and in April, 1928, more money came, all of which was used to pay off the mortgage. She had transferred the property to her sister and she had title when the payments were made. She testified she did not know the $1,000.00 was coming, and was surprised when she got the check.

George J. Kable, one of the executors, testified that he visited Mary E. Davis, and she said to him, George, I owe a loan on the house that I live in and I would like if you would see Uncle Henry and ask him to help me out, to pay on this house, because I can't hardly raise the interest and taxes. I said I will see what I can do. That was in the summer of 1927. I have no letter or receipt of Mrs. Davis acknowledging receipt of the money.

It is the contention of appellants that the $2,000.00, sent to Loa L. Davis, was a loan to Mary E. Davis, to enable her to pay the mortgage upon the property in which she resided.

We have carefully considered the testimony and fail to find anything which indicates in any way that Mary E. Davis personally received any money from Henry C. Kable or that she in any way obligated herself to repay the money he sent to her daughter, Loa.

Before the executors can retain the distributive share of Mary E. Davis in the estate and apply it toward the payment of the $2,000.00 sent to Loa L. Davis, her daughter, there must be some evidence of a liability on the part of Mary E. Davis to pay. We have searched the record in vain for any such evidence and can only come to the conclusion that the money was a gift.

While the evidence discloses that other nieces of Henry C. Kable had received money from him and had given him notes for the same and receipts, agreeing that such amounts should be deducted from their share of his estate, no such notes or receipts were ever given by Mary E. Davis. In fact there is no evidence that Mary E. Davis ever received one cent from her uncle, Henry C. Kable.

We are of opinion that the judgment of the circuit court should be affirmed.

Affirmed.

(Four pages in original opinion.)

14 (65865)

PUBLISHED IN ABSTRACT

Mary E. Lachenmyer, Plaintiff-Appellee, v. Walden M. Glotfelty, doing business as Terminal Cab Company, Defendant Appellant.

Appeal from Circuit Court, Champaign County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8916 **Agenda No. 5**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

Between 11:30 and 12:00 o'clock on the night of April 22, 1934, the plaintiff, Mary E. Lachenmyer, was riding in a Ford coupe owned and driven by her sister, Agnes L. Lachenmyer, in a westerly direction on University avenue, Champaign, Illinois. When the Ford coupe reached approximately the intersection of Fourth street with University avenue, a collision occurred between the coupe and a taxi cab owned by the defendant, Walden M. Glotfelty, and then and there operated by his agent. In this collision both the plaintiff and her sister were seriously injured. The two sisters joined as parties plaintiff, filed a complaint in the Circuit Court of Champaign county against Walden M. Glotfelty and Toby N. Drollinger, co-partners, doing business as "Terminal Cab Company." On motion of the plaintiff in this case the causes were tried separately. For further analysis of the pleadings, and a summary of part of the evidence in this case, reference is hereby made to the opinion in the case of *Agnes L. Lachenmyer* v. *Walden M. Glotfelty,* General Number 8932. This case was tried on counts 1 and 3 of the complaint, which so far as the charge of negligence is concerned, are identical with counts 2 and 3 on which the case of Agnes L. Lachenmyer was tried, and to which reference is made. The only variation being that the complaint in each of these two counts in this case charged that the plaintiff herein was riding as a passenger in a Ford automobile driven by her sister, Agnes L. Lachenmyer. The answer of the defendant denied due care of the plaintiff, the injuries and damages alleged, and all charges of negligence. It admitted the operation of the taxi cab by the defendant through its agent, and sets forth the following: "Admits that said plaintiff, Mary E. Lachenmyer, was in another automobile travelling in a

westerly direction at or near said intersection." All of the witnesses who could be considered eye witnesses who testified in this case also testified in the case of Agnes L. Lachenmyer above referred to, and all of the witnesses who testified as to the position of the automobiles after the accident in the case of Agnes L. Lachenmyer testified in the instant case, except James Lindsay and George F. Miller. For a summary of their testimony reference is made to the opinion in the case of Agnes L. Lachenmyer. In addition thereto, Maude Waters testified as a witness on behalf of the defendant. She had been a passenger in the taxicab at the time of the collision. She testified that she was a nurse; that in her opinion the taxicab was travelling at from 25 to 35 miles an hour, about 30 miles an hour; that just before the collision happened she noticed a dark flash on the right side, but did not know what it was; that she saw the headlights of the other car and in her opinion was in the center of the pavement. Joseph L. Schmitz, office boy in the employ of the Terminal Cab Company, testified that he did not see the accident, but helped to pull the cars apart afterward; that the right wheels of the Ford automobile were approximately 12 to 16 inches north of the old north street car track. The defendant testified that he was at the scene of the accident between 11:30 and 11:45; that there was broken glass and oil spots on the pavement between the two lines of the old street car track; that he saw no skid marks twenty feet long. In addition to the testimony given by Mary Lachenmyer in the other case she testified in her own behalf that since the accident she has lost 12 pounds in weight; that she lives with her mother and sister; that on the night in question she testified, "we were returning from taking a guest of the family home;" that she has driven an automobile for five years; that sometimes she drives while her sister, Agnes, rides with her; that sometimes Agnes drives and plaintiff rides with her; that she did not do anything when the car of the defendant turned in front of them.

Dr. J. B. Christie testified as to some of the care taken of the plaintiff, for which service he has made a charge of $67.00, which was the usual and customary charge for such services. Dr. William F. Johnston testified as to the physical injuries to the jaw and mouth of the plaintiff; that three teeth were out; occlusion bad; that a temporary or partial denture which was removable was constructed; that part of the labial bone was missing; that his charge for services ren-

dered by him was $375.00, which was the usual, customary and reasonable charge for such services.

Dr. Hedgcock testified that he saw the plaintiff the night of the accident; that the left eye, which he removed, was out of the socket; that her nose was mashed and crumpled, with a compound comminuted fracture; that there was a cut on the cheek, across the face, from the ear, up to each nostril; that she had a frontal skull fracture, had a cut on the left leg; that she was on the operating table for three and a half hours; that the condition of the nose would cause impairment of the hearing; that his total bill was around $795.00, which was the usual, customary and reasonable price for such work. Dr. J. M. Christie testified on behalf of the plaintiff; that he saw the plaintiff on the night of the accident; that her face was crushed in, that the left eye was on the cheek; that there was bleeding from eye, nose, mouth and one ear; that the bones in her face were splintered and displaced; that there was a cut which extended from her ear to her nose; that there was a fracture of the zygoma; that the left antrum was crushed in; that there was a broken collar bone, a bruise on the right shoulder, the bones to which the teeth were attached were broken, and the plaintiff was in bad shock; that the scar on the left cheek restricted the motion of the jaw and that this is permanent. A motion was made by the defendant, at the close of the plaintiff's evidence, and again at the close of all the evidence, that the court instruct the jury to find for the defendant. Both motions were denied by the court. This cause was submitted to the jury, who returned a verdict finding the defendant guilty and assessing plaintiff's damages in the sum of $15,000. Defendant's motion for new trial was overruled, and the court entered judgment on the verdict, against the defendant, in the sum of $15,000 and costs, in favor of the plaintiff. It is from this judgment the defendant has prosecuted an appeal to this court, claiming the following errors relied upon for reversal: That the court erred in refusing to direct a verdict and instruct the jury to find the issues for the defendant, at the conclusion of the plaintiff's evidence, and at the conclusion of all the evidence; in the admission of improper and incompetent evidence on the part of the plaintiff; in the exclusion of competent evidence on behalf of the defendant; in refusing to exclude incompetent evidence on behalf of plaintiff; in giving each and all instructions, as said instructions are not instructions covering the entire case, but are general

and abstract propositions of law; in not giving an instruction covering relationship of plaintiff to the driver of the car, and particularly on joint or common enterprise; that the verdict is contrary to the law and evidence, and is excessive; that the court erred in overruling the motion for new trial.

From a consideration of the testimony offered by plaintiff and defendant, it plainly appears that there was a sharp conflict as to the happening of this accident. If the testimony of the plaintiff in this case, and of her sister, who was driving the automobile, is true, and the defendant was travelling at the rate of speed of 45 miles an hour, as testified by Irvin R. Maxwell, or 30 miles per hour, as testified by the passenger in the taxicab, and he pulled suddenly out of his line of traffic, and into the line of traffic where the automobile in which the plaintiff was riding was rightfully travelling, with no other excuse than a desire to pass a taxicab which was ahead of it, and if he sounded no signal as he did this, and was 20 feet from the car in which plaintiff was riding when he pulled out of his own line of traffic, and if the plaintiff was looking ahead, and the impact occurred before she had any opportunity to warn the driver of the car that there was a cab approaching, or if the driver of the car saw the cab approaching so that a warning was unnecessary, then the plaintiff was entitled to recover in this case. On the other hand, if the testimony of the defendant's driver is to be believed, taken together with the other testimony as to the position of the cars, a finding for the defendant might well have been justified. The question of the negligence of the defendant, and the contributory negligence of the plaintiff, were questions of fact, which were properly submitted to a jury, and the jury having by its verdict determined that the plaintiff was free from negligence, and the defendant was negligent there is ample evidence to sustain the verdict. The question of the credibility of witnesses was for the jury, and no error was committed by the trial court in refusing to grant defendant a new trial, unless error was committed by the trial court in connection with the giving of instructions, or the verdict is excessive. The defendant in his errors relied upon for reversal, or assignment of errors, claims that the verdict is excessive. No authorities are cited in the brief proper, nor is the matter argued in the argument itself, except the statement that "the *ad damnum* was $15,000, and the jury gave the plaintiff the full amount thereof." That the verdict was the result of passion and prejudice; that the defendant is the operator of

a taxicab and the jury assumed he had insurance. There is nothing in the record on which to base this last statement, and the fact that the limit of the *ad damnum* was given is no proof either that the verdict is the result of passion or prejudice, or that it is excessive, provided the evidence discloses sufficient injuries to warrant such a verdict as we feel it did. There is evidence of medical, hospital, and expense for nurses of over $2,100, the recital heretofore made of the various permanent injuries including the loss of an eye, which this plaintiff sustained as a direct result of this accident, would not warrant this court in saying that this verdict was excessive.

The defendant also claims that the trial court erred in giving each and all of the instructions, as said instructions are not instructions covering the entire case, but are general and abstract propositions of law. This assignment of error cannot be considered by this court because after the trial court had prepared a narrative instruction, such narrative instruction was submitted to counsel for both plaintiff and defendant for objection and suggestions, and no such objection as is now urged was made at that time. Therefore, in accordance with the provisions of Section 67, Civil Practice Act, 1933, the objection now urged was waived, and can not be considered at this time. At that time the defendant did offer two instructions as suggestions, which were refused by the court. We will not set them out, but each one has to do with the proposition that under the evidence the plaintiff was not a passenger but was engaged in a joint enterprise with her sister, and that therefore, if the driver of the automobile was guilty of any negligence such negligence could be imputed to the plaintiff in this case. In this connection we will consider the evidence, and all the evidence, bearing upon that point. The plaintiff testified that she and her sister both lived at home with their mother; that sometimes she drove the car and her sister rode with her, and sometimes her sister drove the car, and she rode with her sister. It is undisputed that the car was owned by the sister, Agnes L. Lachenmyer. As to the purpose for which the car was operated the only testimony is this: The plaintiff testified, "we were returning from taking a guest of the family home." Later, in the cross examination of the plaintiff these questions were asked her; to both of which questions objection was sustained: "Did you feel if you wanted to go some other direction your sister would take you?" "If you had told your sister to turn south on Fourth street she would have done it, wouldn't

she?'' Certainly, the objection to the first question was properly sustained, because we fail to see what probative value an expression of the plaintiff's feeling on a subject might have, and as to the second question, it called for an opinion of the witness on a matter concerning which she could not tell. It may or may not have been true that the sister would have complied with her request, but even so that would neither tend to prove nor to disprove that they were engaged in a common enterprise of such a character as to make the driver the agent of the passenger, or chargeable with the driver's negligence. No attempt was made by any further questions to establish any joint enterprise, nor do we feel that the statement made by the plaintiff, ''we were returning home from taking a guest of the family home'' in any way tends to establish a joint enterprise, because there is not a scintilla of evidence which indicates that the plaintiff could direct or control the movement of the car, or the method of driving, nor is there a vein of common financial interest indicating a quasi partnership entailing the usual joint control. There is no showing of a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movement of each other with respect thereto. (*Fisher* v. *Johnson,* 238 Ill. App. 25; *Yeates* v. *Ill. Cent. R. Co.,* 241 Ill. 205.)

Therefore, we find no error in the trial court's rulings on the questions asked, or in his refusal to incorporate the suggestions presented to him in the narrative instruction. In our opinion, after a thorough examination of the record in this case, no reversible error was committed by the trial court, and the defendant had a fair opportunity to present his defense. Therefore, the judgment of the trial court should be, and the same is hereby affirmed.

Judgment affirmed.

(Twelve pages in original opinion.)

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Opinion filed January 17-1936

PUBLISHED IN ABSTRACT

83

In the Matter of the Conservatorship of Emma M. Swank, an Incompetent, v. Harold E. Henderson, as former conservator, Appellant.

Appeal from Circuit Court, Morgan County.

OCTOBER TERM, A. D. 1935. 283 I.A. 654

Gen. No. 8922 **Agenda No. 11**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

On January 16, 1932, Harold E. Henderson, a receiving teller in The Ayers National Bank of Jacksonville, Illinois, was appointed conservator of Emma M. Swank, an incompetent, in Morgan county, Illinois, and letters of conservatorship were issued to him. His inventory was filed on January 25, 1932, and approved the following day. As such conservator there came into his hands certain real estate, a savings account which had been opened by his ward in The Ayers National Bank of Jacksonville, Illinois, amounting to $8,119.89, and a checking account in the same bank, in the amount of $77.67. On July 7, 1932, he filed a petition to invest $1,100.00 in a real estate mortgage, bearing 7 per cent interest, and on July 9, 1932, the court ordered the investment be made, and the conservator withdrew said sum from the savings account for that purpose. On November 21, 1932, the savings account in The Ayers National Bank showed a balance of $7,115.64, and on that date the bank was closed by the Comptroller of Currency. $6,919.89 of the savings account was originally in the account when it came into the hands of the conservator, and after that time it was increased by a credit of $195.75 and decreased by the $1,100.00 mortgage loan, and $100.00 paid out for expenses under court order. This savings account carried by the bank, drawing 3 per cent interest, payable January 1, and July 1, had a warning cap on the savings account card upon which was written "Harold E. Henderson Cons." Henderson did not come in contact in his employment with persons desiring to borrow money on real estate and had consulted the officers of the bank who handled such matters, and asked them to advise him when suitable first mortgage investments were available in which the conservatorship funds could be invested. It appears that he had

no knowledge of, and no reason to suspect that the bank was insolvent. The checking account which had come into his hands as conservator, and which had a balance when the bank closed of $271.90 was carried in the name of Harold E. Henderson, conservator, Emma Swank. Over this account H. C. Clement, an officer of the bank, exercised joint control by arrangement with Henderson's bondsman. No one exercised joint control with Henderson over the savings account, and withdrawals were made on it over his own signature alone. In June, 1933, after hearing the County court of Morgan county entered an order of restoration, and upon a further hearing in November the Farmers State Bank and Trust Company was appointed conservator. The final report of Henderson as conservator showed both of the above mentioned accounts in The Ayers National Bank at the time that bank closed. Objections were filed by the ward after her rights were restored, and later by the successor conservator, which alleged that the conservator Henderson in violation of law kept in permanent deposit in the Ayers bank, certain funds in a pretended savings account; that the bank went into the hands of a receiver, and the funds were wholly lost; that Henderson had not placed and kept the ward's money at interest upon securities as required by statute, and that he failed to manage the funds of the ward according to law and for the best interests of the ward. The order appointing Farmers State Bank and Trust Company conservator found all of the facts recited above, and in addition that a rule of the savings department of The Ayers National Bank, required 90 days notice of withdrawals of sums over $500.00, but was not generally enforced; that Henderson wrongfully surrendered control of the checking account; that for over 10 months Henderson did not make the active attempts to secure investment of funds that his position as conservator required, and that he allowed said amounts to remain in a savings account in the bank; that it was his duty to be active in collecting assets converting illegal investments and procuring sound investments, but found that Henderson throughout acted in good faith. The order further sustained the objections of the Farmers State Bank and Trust Company as conservator, and ordered that Henderson within 10 days file an account in accordance with the findings therein, and pay to the Farmers State Bank and Trust Company as conservator with interest, the sums which were in the two accounts in the Ayers bank when it closed, and

that upon payment of said sums, and the filings of receipt from the present conservator, and the delivery of all securities by Henderson, he be discharged from further liability.

From the order so entered this appeal is taken, by Harold E. Henderson as former conservator, who assigned as error all of the findings of the court, and its judgment and decision.

Under the statute when the appellant had qualified as conservator, and taken over the control and management of his ward's estate he became bound by the provisions of the statute, to place and keep his ward's money at interest upon security as is provided by Ill. State Bar. Stats., 1935, Ch. 86, Section 18, which is as follows: "It shall be the duty of the conservator to place and keep his ward's money at interest, upon security to be approved by the court, by investing, on approval of the court, the same in United States bonds, or in the bonds of any state, county, city or municipality, which are not issued in aid of railroads and where the laws do not permit said counties or municipalities to become indebted in excess of five per cent of the assessed valuation of property for taxation therein, and where the total indebtedness of such county, city or municipality does not exceed five per cent of the assessed valuation of property for taxation at the time of such investment. Personal security may be taken for loans not exceeding $100. Loans upon real estate shall be secured by first mortgage, or trust deed thereon, and not to exceed one-half the value thereof. All loans shall be subject to the approval of the court. The conservator shall be chargeable with interest upon any money which he shall wrongfully or negligently allow to remain in his hands uninvested, after the same might have been invested." The requirements of the statute set forth above have been declared by the Supreme court of this state to be mandatory in their nature, (*McIntyre* v. *People*, 103 Illinois 142; *Hughes* v. *People* 111 Ill. 457; *Kattelman* v. *Guthrie's* Estate 142 Ill. 357; *Chapman* v. *American Surety Co.*, 261 Ill. 594.) Regardless of the fact that the savings account in question was subject to the reservation that the Ayers bank had the right to demand and to have 90 days previous notice in writing as a condition of payment on all sums of or exceeding $500.00, and in spite of the contentions of appellant that the statute does not specifically require the conservator to invest money or liquidate existing investments which he improperly holds within a definite period it is obvious

that after the interest payment date on July 1, 1932, the savings account might have been withdrawn without loss of interest and invested in accordance with the statute. This was not done, and some ten months elapsed between the time appellant was appointed conservator and the date on which the bank was closed during which interval, after making one mortgage loan for $1,100.00 he did nothing further except to ask the officers of the bank to let him know when suitable first mortgage investments were available, and this does not appear to us to have been the diligence required of him as conservator in the light of the mandatory character of the statute.

Counsel for appellant point out that the court may take judicial notice of the general economic depression by reason of widespread financial and economic collapse, and in view thereof that the action of Henderson as conservator in keeping the funds in the savings account should be regarded as proper care of the funds in his custody rather than negligence in his duty. It appears to us that under these circumstances the conservator should be more cautious that at other times and that such caution would dictate that a large portion of the estate in his hands should not be kept in a savings account but rather in some of the forms of investments authorized by the statute. The argument of appellant's counsel that Henderson being employed in the receiving department of the bank had no occasion to come in contact with persons desiring to borrow money on good real estate securities and simply consulted with officers of the bank who were in charge of loans does not indicate that he was using diligence in performing his duty as an officer of the court, and does not excuse him from recognizing the mandatory character of the statute which requires him to keep the funds in a safe investment. It has been indicated in the case of *Rawson* v. *Corbett,* 43 Ill. App. 127 that a sixty-day period from time of receipt of money by a guardian would be a reasonable time to effect a loan of the same. In that case certain funds were collected by a guardian, and on February 11, 1882, he had on hand the sum of $4,863.69, and on the 12th day of March, 1883, the sum of $1,969.32, which was not invested or loaned but permitted to remain in the bank until January 1, 1885. In that case the court said: "There is no evidence in the record showing any effort on the part of the guardian to loan this money, or tending to show that a loan thereof could not have been effected. The failure to attempt to loan it is a neglect of

duty on the part of the guardian to such an extent as to make him liable for interest, and as sixty days from the time of its receipt would be a reasonable time to effect a loan of the same, he should be charged interest on each of those sums from sixty days after their receipt * * *'' In *Bond* v. *Lockwood,* 33 Ill. 212, and *Bennett* v. *Hanifin,* 87, Ill. 31, the court indicates that six months time is a reasonable period for the investment of fiduciary funds such as in the instant case. In this case, as pointed out above, there is little evidence of any diligence on the part of Henderson to effect loans of the money which he had in the savings account, and there is nothing in the record to indicate that such loans could not be effected. On the contrary, he could have invested in government securities or municipal bonds but did not see fit to do so, and failing to make such investments of the funds held in the bank, for a period of ten months, we think was clearly in violation of the statute. Appellant's argument would indicate that the only prudent course for the conservator to have followed would have been to invest the funds in first mortgages, and would apparently have this court believe that such an investment was the only type that the conservator could reasonable make. Certainly, in the face of the argument used by appellant's counsel relative to the economic depression, such a position is scarcely tenable.

It is further contended by counsel for the appellant that the deposit of the funds in the savings account did constitute an investment. However, it is not named as one of the possible forms of investment by the statuts, and our Supreme court has so held, and regardless of the fact that a savings account may be an investment, the duty of the conservator, under the statute, remains the same, and he must within a reasonable time put the funds into one of the forms of investment specified by the statute. Furthermore, such investments as he makes under the statute must be approved by the court, and while they need not be approved at the time they are made, they must be approved subsequently, or the conservator will become personally liable. (*Bruner* v. *Wolford's Estate,* 356 Ill. 514.)

For the reasons given, the findings of the Circuit court of Morgan county in this cause, and the order entered thereon, sustaining the objection of the Farmers State Bank and Trust Company to the final report of Henderson as former conservator, and the further order that said Henderson as former consevator pay to the Farmers State Bank and Trust Company as con-

servator the sum of $7,115.67 with interest at 5 per cent per annum from July 16, 1932, and the further sum of $270.90 with interest at 5 per cent per annum from November 21, 1932, and that upon the payment of said sums and the filing of receipts therefor and the surrender of all securities and other assets mentioned in the report of Henderson as conservator, he be discharged from further liability, is hereby affirmed.

Order Affirmed.

(Ten pages in original opinion)

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Opinion filed January 17-1936

PUBLISHED IN ABSTRACT

William L. O'Connell, Receiver of the Griggsville State Bank, Appellee, v. E. L. Hitch, et al., Appellants.

Appeal from Circuit Court, Pike County.

OCTOBER TERM, A. D. 1935.

283 I.A. 654²

Gen. No. 8926 **Agenda No. 14**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

The Illinois Valley Bank, organized under the laws of the State of Illinois was, prior to the 5th day of December, 1928, doing a general banking business, and on or about the said date was insolvent, although this fact was not known. The Griggsville State Bank was organized under the laws of Illinois to take over the Illinois Valley Bank, by which transaction stockholders of the Illinois Valley Bank became stockholders of the Griggsville State Bank. The Griggsville State Bank took over the assets of the Illinois Valley Bank, and while the latter bank ceased doing an active business, it did not surrender its charter. In this transaction by which the Griggsville State Bank took over the assets of the Illinois Valley Bank, the liability of the stockholders of the Illinois Valley Bank under Section 6, Article 11, of the Constitution of Illinois, was preserved. This liability was evidenced by a note in the amount of $25,000, executed by the Illinois Valley Bank. The Griggsville State Bank then proceeded to transact business, with the assets formerly owned by the Illinois Valley Bank, and new capital. On December 30, 1931, the Griggsville State Bank became insolvent. H. S. Miller was appointed receiver of said bank by the Auditor of Public Accounts. Subsequent to his appointment the receiver filed his bill in chancery setting up the insolvency of the Griggsville State Bank, and of the Illinois Valley Bank, and the owners of stock in the Illinois Valley Bank, which included the name of the appellant, E. L. Hitch, as the owner of 10 shares of stock. To this bill the appellant filed an answer and a plea. The plea sets forth that E. L. Hitch's brother, Rufus Hitch, was the owner of 20 shares of the capital stock of the Illinois Valley Bank, and that he had negotiated with appellant to sell him

10 shares of said stock; that such negotiations were not completed; that appellant refused to purchase the stock, never agreed to, and never did purchase it, never saw the certificate pretending to evidence the transfer of ownership of the stock to him, but alleged that upon being asked to accept the stock, and receipt for the same "precisely" refused to do so. The plea further sets forth that he never received any notice of any stock holders' meeting, and never received any dividends on the stock, and never, until after the filing of the bill in this case, knew that the records of the bank purported to show that he was the owner of the stock, or that the same had been reported by the officers of the bank as having been sold to him; that he had authorized no one to order the certificate written or to accept the same; that he had never authorized any one to represent to the bank, or to any one else, that he owned the stock, and that he had refused at all times to in any way ratify the transfer of said stock to him. The answer which was filed by appellant alleges the same matter contained in the plea. Upon the plea being set down for argument it was overruled by the court. The appellant elected to stand on his plea, and an order of default was entered, and judgment rendered against him on April 25, 1935, in the sum of $1,000, and costs, in favor of William L. O'Connell who had been substituted as receiver of the insolvent bank after the commencement of the suit by Miller. From this judgment this appeal is taken to this court. The appellant sets up three errors relied upon for reversal but the sole contention is that his plea constitutes a complete defense to the bill filed by the receiver.

The sole question to be decided in this case is whether the pleadings show any act, or the lack of action, upon the part of the appellant which would be tantamount so far as the creditors of the bank are concerned to an admission of ownership by the appellant of stock in the closed bank, or any act or lack of action on the part of the appellant of knowingly permitting the bank to issue a stock certificate in his name, and carry a record of such alleged stock ownership upon the books of the bank. It has been held that one who knowingly permits his name to be carried on the books of a bank as a stockholder is thereby estopped from denying a liability on such stock. (*Rosenfeld* v. *Horwich,* 221 Ill. App. 304.) But, as the court said in that case, quoting from *Golden* v. *Cervenka,* 278 Ill. 409, "Of course, the liability of a stockholder in a

State Bank may not be imposed upon one, by including his name in the list of subscribing stockholders filed with the Auditor of Public Accounts and recorded in the Recorder's office of the county and by making out a stock certificate in his name, all without his knowledge or consent." The court further said: "A creditor is entitled to hold him liable as a stockholder who appears on the books of the corporation to be the legal owner of the stock. * * * The stockholders are liable, not because of actual notice to any particular creditor that any particular person is a stockholder, but because the law imposes the liability, and the record in the Recorder's office is for the convenience of persons dealing with the bank in ascertaining who are the stockholders."

Therefore, it is necessary to decide whether from the pleadings in this case the appellant knowingly permitted his name to appear upon the record of the bank as a stockholder, and a certificate of stock to be issued to him. In this case the plea sets up that the appellant had some negotiations with his brother relative to the purchase of the 10 shares of stock which the complaint alleges he owned, and that subsequently he refused to accept a certificate for such stock and to sign a receipt therefor. This, certainly, would indicate that such a stock certificate had been presented to him, and that knowing of its existence he could reasonably be aware that the records of the bank would indicate the ownership of the stock by him which the certificate evidenced. While the plea in this case filed by appellant shows a refusal to accept the stock certificate which the bank had issued, there is nothing in the plea to show that appellant took any steps to disavow the tranfer of the stock to him, so that the creditors of the bank would have notice of his refusal to acknowledge ownership. As stated by the court in *Rosenfeld* v. *Horwich,* 221 Ill. App. 304, "If, instead of receipting for the 150 shares of stock and indorsing it, for the very apparent accommodation of Munday, the defendant had publicly repudiated the issuance of that stock to him in some suitable manner, as by filing his affidavit to that effect in the Recorder's office, with a demand that the certificate in question be immediately canceled, he would never have become a holder of the stock with his consent or acquiescence and would never have incurred the liabilities as a holder of that stock." Thus, we are led to inquire why, in the instant case, the appellant after showing in his plea that he had knowledge of the issuance of the certificate of stock in his name, shows no act on his part which would amount to a public repudiation of his ownership? Since the plea admits a

knowledge by the appellant of the issuance of the stock and shows no effective steps taken by him to secure a cancellation thereof during the time the stock stood in his name on the books of the bank and since it is not shown by appellant's plea that he performed his legal duty in using the care and diligence required of him to see that the creditors of the bank were not misled by his conduct, in failing to disavow publicly his ownership of the stock, the plea was insufficient in law and was properly overruled by the trial court.

The defendant, E. L. Hitch, abided by his plea and elected not to plead further. Therefore, the bill was taken as confessed as to him and a decree and order entered against him in accordance with the bill. In all of these rulings the trial court was correct, and the judgment of the trial court is hereby affirmed.

Judgment Affirmed.

(Seven pages in original opinion)

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PUBLISHED IN ABSTRACT

85

Agnes L. Lachenmyer, Plaintiff-Appellee, v. Central Mutual Insurance Company of Chicago, Defendant-Appellant.

Appeal from Circuit Court, Champaign County.

OCTOBER TERM, A. D. 1935. 283 I.A. 654[3]

Gen. No. 8941 **Agenda No. 21**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

On January 26, 1935, plaintiff, Agnes L. Lachenmyer, recovered a judgment against Walden M. Glotfelty, for $10,000, on account of injuries sustained in an automobile collision on April 22, 1934, with a taxi cab owned by Glotfelty. Thereafter she filed this suit, setting forth these facts, and the further fact that there were two policies of insurance issued by the defendant insurance company covering the said Glotfelty, and the said cab, which was involved in this collision, in full force and effect at the time of said collision, and the further allegation that by virtue of the statutes of Illinois, Cahill, 1933, Chap. 73, Sec. 466, the plaintiff is entitled to maintain suit directly against the insurance company on said policy, and that all conditions precedent have been performed. For further description of the provisions of said policies reference is made to the opinion of this court in case entitled *Mary E. Lachenmyer* v. *Central Mutual Insurance Company of Chicago,* General Number 8920. The answer of the defendant admits the execution of the policies, the judgment as set forth in the complaint, and the performance of all conditions precedent, alleges the unconstitutionality of the statutes whereby plaintiff is given the right to maintain the suit. Answer further sets forth that Mary E. Lachenmyer had recovered a $15,000 judgment against the defendant Glotfelty growing out of the same collision in which the plaintiff was involved and that Mary E. Lachenmyer had sued the defendant on the two insurance policies, and secured a judgment of $7,601.12 against the defendant; it denied the defendant was liable for more than $2,397.89 to the plaintiff in this case. Plaintiff's reply to the answer was that the judgment of $7,601.12 recovered by Mary Lachenmyer against the

defendant was not a final judgment because an appeal had been perfected from said judgment, and appeal bond filed; that nothing had been paid on the judgment; also denied the unconstitutionality of the statute in question. Jury was waived, and the case was tried by the court. The same documentary proof was made as to the matters set up in plaintiff's complaint, and as to the policies, as was made in the case of Mary E. Lachenmyer, and it was further stipulated that prior to this hearing Mary E. Lachenmyer had recovered a judgment against the defendant Glotfelty, in the sum of $15,000 for personal injuries sustained in the same collision in which this plaintiff was injured, and further that she recovered a judgment against the defendant insurance company in the sum of $7,601.12, and that an appeal had been prosecuted therefrom, an appeal bond filed, and the appeal was then pending. After hearing the court found for the plaintiff, in the sum of $7,621.60, and entered judgment against the defendant, Central Mutual Insurance Company, in that sum, and for costs. It is from that judgment that the defendant, Central Mutual Insurance Company of Chicago has prosecuted this appeal, assigning the following errors: The court erred in entering judgment against the defendant in the sum of $7,601.12; in allowing interest on the principal judgment, as interest was not pleaded or claimed in said declaration; in the construction of the policies in that the court held that there were two policies, each with full liability; in not directing a verdict in favor of defendant at the close of all the evidence; in finding that any demand had been served on the defendant for the payment of said judgment or any particular sum of said judgment; in assessing an excessive judgment; in not granting a motion for new trial; in assessing judgment in favor of Agnes Lachenmyer on Plaintiff's Exhibit B or taxi cab liability bond after having assessed judgment on the same in the full amount; in rendering a judgment against the defendant, and in no event should the judgment have been for more than $2,397.88.

The same propositions of law as to the construction of these two policies, Plaintiff's Exhibits A and B, are raised in this case, as were raised in the case of Mary E. Lachenmyer. The situation in the two cases is much the same. However, in this case it does affirmatively appear that a previous judgment had been rendered against the defendant, Glotfelty, for $15,000, for damages sustained by another in the same collision in which this plaintiff was injured. It further appears that Mary E. Lachenmyer brought suit upon these

policies, and recovered a judgment for $7,601.12, and that an appeal has been prosecuted therefrom, and the bond filed, making said appeal a supersedeas. In view of that fact the judment against the defendant, is not a final judgment, and therefore, may be disregarded. (*People* v. *Pam* 276 Ill. 181; Civil Practice Act, Section 92.) The judgment for $10,000 against Glotfelty on which this suit is based is a final judgment so far as anything that appears in this record. It is appellant's contention as we understand it from its brief and argument that because a judgment has been obtained against its assured on which it has paid nothing, the amount of such judgment may be deducted where a second judgment has been obtained, and suit is brought on that judgment. With this proposition we cannot agree. A policy is satisfied not by the obtaining of a judgment against the insured but by the payment of the full amount due under that policy. Nowhere is it alleged that any money has been paid by this defendant in discharge of its obligation under its policy or policies. We, therefore, hold that the fact that a judgment has been obtained against the party whom this defendant insured is no defense as to a suit by one who subsequently obtains a judgment against the same assured, for injuries sustained growing out of the same accident. This is in accordance with the statute under which the smaller policy, Plaintiff's Exhibit B, was written, Cahill Statutes, 1933. Ch. 95-A, Sec. 44.

Defendant in its argument says the question is whether the defendant is liable for $10,000, for $12-500, or for $15,000. We can not see from the pleadings and the evidence that that question was raised at all.

What was said by this court in the opinion in the case of Mary E. Lachenmyer as to the amount of the judgment, the allowance of interest, and that the judgment is excessive, applies with equal force in this case. While not assigned as error, the constitutionality of various statutes was raised by the pleadings, and in the trial court. These matters can not be considered in this court because by appeal to this court such questions are waived. A careful examination of the record discloses no reversible error committed by the trial court. We believe that the finding and judgment of the trial court is correct, and therefore, its judgment is hereby affirmed.

Judgment Affirmed.

(Five pages in original opinion)

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Abstract

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PUBLISHED IN ABSTRACT

O'Meara Construction Company, Inc., a Corporation, Plaintiff-Appellee, v. Joseph Meltzer, Inc., a Corporation, Defendant-Appellant.

Appeal from Circuit Court, Adams County.

OCTOBER TERM, A. D. 1935. 283 I.A. 6544

Gen. No. 8944 **Agenda No. 23**

MR. JUSTICE ALLABEN delivered the opinion of this Court.

This is a suit brought by the O'Meara Construction Company, Inc., a corporation, against Joseph Meltzer, Inc., a corporation, to recover for merchandise sold, for the rental of a tractor, of a drag line, and for damages to two drag lines. The amended complaint filed by plaintiff consisted of five counts, the first count is a claim for cable which it is alleged plaintiff sold to defendant, but since the issues on that count were found for the defendant, and no cross-errors assigned, it becomes unimportant in the decision of this case. The defendant company was a general contractor which had undertaken to construct Lock 21 in the Mississippi River, near Quincy, Illinois, which entailed in connection with the construction, the furnishing of certain supplies and materials at the site of the work, and the moving and hauling of earth. The second count of the complaint alleges the foregoing facts, and that the defendant on or about December 16, 1933, entered into a contract with a partnership, of which the plaintiff is the successor, to furnish tractors and operators at defendant's request while the work on the lock was in progress, and to pay the reasonable value for such services; that plaintiff company furnished tractors with operators to January 20, 1934, for a period of 55½ hours, and from January 20, 1934, until March 29, 1934, for 107½ hours, and tractors without operators during the latter period for 62 hours, by reason of which plaintiff became entitled to $1,102.00.

The third count of the amended complaint alleges that on March 29, 1934, the defendant hired a crane by the month from plaintiff, and referred to as K-48, to be returned in good condition, reasonable wear and tear excepted, at the rate of $1,100.00 a month; that the defendant took the machine on April 2, 1934, used

it until December 26, 1934, and that deducting rental paid from the total amount due, there remained a balance of $3,235.16.

The fourth count alleges that the defendant, disregarding its obligation to return machine K-48, in the condition required by the contract, allowed it, through negligence and ill use, to be damaged to the extent of $5,000.00 above the ordinary wear and tear.

The fifth count alleges that the defendant hired a machine referred to as K-55, under the same terms as applied to K-48, retained possession thereof from April 2, 1934, to June 30, 1934, inclusive, that the rent was paid on machine K-55, but that it was returned in poor condition and through negligence and ill use was damaged to the extent of $863.69 above ordinary wear and tear.

Defendant filed its answer denying that it entered into a contract for the services of the tractor, or that it became necessary for the defendant to move and haul the items mentioned in the second count of the complaint, denied that it rented the tractor, and denied the amount which the tractor was alleged to be reasonably worth in the complaint, and further denied that the defendant used the tractor for the time alleged, or that there was anything due plaintiff for its use. The answer alleges that on December 11, 1933, the defendant and the partnership to which plaintiff succeeded entered into a contract in connection with the work on Lock 21, by which plaintiff was to perform all excavation, dispose of the earth excavated, remove all material encountered in the work of excavating, and to furnish all necessary labor and equipment to perform expeditiously the work required; that one of the tractors used by plaintiff was the property of the defendant; that on or about the 31st day of March, 1934, the plaintiff and defendant decided to abandon their contract, which they did on that day, and settled all differences by defendant paying to plaintiff all moneys then due; that a mutual release was signed by plaintiff and defendant, whereby each released the other from all moneys due, accounts, actions, claims, and demands, of any nature whatsoever from the beginning of the world to date.

Defendant further answers count three by denying that it hired crane K-48 as alleged, or that it retained possession of it and used the same from April 2, 1934, to December 26, 1934, and affirmatively alleges that by contract entered into on September 1, 1934, defendant agreed to pay $30.00 a day for said machine for such

days only as it was used; that all rentals therefor had been paid. The answer further denies that crane K-48 was broken or damaged through defendant's negligence and ill use, and alleges that it was in a bad state of repair at the time it was delivered, and the defendant repaired it in order to make use of it; that crane was carefully operated and used in the type of work to which it was adapted. That the repairs were made at the expense of the defendant, and that it was kept in good condition by defendant, and returned in as good condition as received, ordinary wear and tear excepted. Defendant then admits the hiring of Crane K-55, on or about March 29, 1934, and its possession thereof from April 2, 1934, to June 30, 1934, but denies that it was damaged by its negligence or ill use, and further alleges the same use, care, and condition upon return thereof as Crane K-48, and denies that plaintiff is entitled to recover any of the amount claimed in counts 2 to 5, inclusive, of the complaint or any part thereof.

Plaintiff then replied to defendant's answer admitting the contract of December 11, 1933, denying the work referred to in count 2 of the amended complaint was included in this contract, but alleged that it was extra and additional work at set out in the complaint, denied that one of the tractors used by plaintiff belonged to defendant, admits the abandonment of the sub-contract of December 11, 1933, on March 31, 1934, and the settling of differences under the sub-contract, and the execution of mutual releases of liabilities under the sub-contract, but denies any settlement for work and services set out in count 2 of the amended complaint. The plaintiff's reply further denies that on March 29, 1934, or at any other time, defendant hired from plaintiff the machine K-48 under written contract of that day, and denies that the terms of the contract are as set up in defendant's answers; avers that on July 23, 1934, that it attempted to remove the machine but could not because defendant was using it and would not surrender it to plaintiff, charges that up until December 26, 1934, the machine was used by defendant, denies the alleged agreement of $30.00 a day for the use of the machine, and re-alleges that there was still due the sum of $3,235.16. The reply further denies that machine K-48 was in a bad state of repair when delivered, or that it was necessary for defendant to make repairs; alleges that it was in first-class condition when delivered and denies that it was operated properly, and used only for the type of work

for which it was adapted; avers that said machine was negligently and unskillfully used for purposes for which it was not adapted; that it was not properly maintained, and denies that it was surrendered in as good condition as when delivered, ordinary wear and tear excepted. The reply then re-alleges the negligent use of the machine K-55 and the damage thereto. The cause was tried before the court, without a jury, and the court allowed plaintiff $551.00 under count two, $265.16 under count three, $5,000.00 under count four, and $863.69 under count five, and entered judgment on its finding against the defendant, in favor of the plaintiff, for $6.679.85 and costs of the suit.

From this judgment the defendant prosecutes this appeal to this court, charging as error that the court should have found that plaintiff had released all damages, that plaintiff was not entitled to recover, under count three, an amount held back by the Labor Review Board; that there was no proof of negligence, as charged in counts four and five, or proof of damages under those counts; that the damages allowed under counts two, three, four and five, were excessive, and that the findings of the court were against the manifest weight of the evidence, and law; and further, that the court erred in ruling on the admission of certain evidence.

The first contention of the appellant that the release executed by the parties was an absolute bar to recovery under count two requires that we discuss briefly the testimony concerning the sub-contract alleged in count two. The sub-contract of December 11, 1933, provided for plaintiff to furnish certain tractors and operators. Said contract did not include within its terms any provisions for the rental of the tractors, and the rental agreement was never reduced to writing. The evidence further shows that the exclusive ownership and control of all three tractors was to be in the O'Meara Construction Company and further shows that said tractors furnished to the Meltzer company from time to time were used for work not encountered by the sub-contractor in its excavating contract, but that they were used for hauling stone, logs, stumps, piling, steel beams, and other work which for the most part was not encountered under the sub-contract of the Meltzer company. This testimony was given by Mr. O'Meara and corroborated in many respects by Mr. Burgland, who was the superintendent for the Joseph Meltzer Company. The release executed under date of March 31, 1934, by and between the parties refers to the con-

tract entered on December 11, 1933, and waives and releases any claims under that contract, and concludes with a general release of all moneys, accounts, actions, claims and demands of any nature. It has been held in this state that in a release where there is a particular recital followed by general words of release the latter are limited and qualified by the particular words. (*Todd* v. *Mitchell,* 168 Ill. 199.) In this case, after stating the above rule, the court said: "Viewed in the light of all the evidence in the case, and in the light of the special as well as the general recitals in the release, it clearly appears that the intention was to release only those matters specially recited. This being true, the release was not a bar to this action." We believe from the testimony in this case, and the recitals contained in the release that it was the intention of the parties that the release should be effective only as to the terms of the sub-contract which had been reduced to writing, and was not intended by the parties to affect the rental agreement concerning the use of the tractors.

The second ground upon which defendant asks reversal is that plaintiff was not entitled to recover an amount held back by the Labor Review Board. It appears that the defendant's contention is that it was authorized by the Labor Review Board to withhold $251.10 from any moneys owing to the plaintiff, but it did not set up in its pleadings that the money was so withheld. We, therefore, cannot consider this defense upon appeal.

The third ground for reversal urged by defendant-appellant is that there was no proof of the negligence as charged in counts four and five, or proof of damages under those counts. The trial judge in this case was in a position to see the witnesses, and from his written decision in the case it is obvious that he has made a careful analysis of the testimony of the witnesses. From this, and from an examination of the testimony of these witnesses by this court it appears that when the machine K-48 was turned back to plaintiff by the defendant it was in a badly damaged condition. That machine K-55 which was released to plaintiff prior to the machine K-48 was in better condition. We are, therefore, led to inquire why the defendant should have returned the better machine and continued to use the inferior one for its work since the rental price of each of the two machines was the same, and there is nothing shown in the evidence that machine K-48 was any better adapted for the work which was

being performed than K-55. This would indicate to us that machine K-48 could not have been in the condition which defendant's witnesses testified on July 1, 1934, when the machine K-55 was returned. The evidence given by the employees of the Link-Belt factory, the manufacturer of the machines in question relative to the condition of the machines K-48 and K-55 was given by men who were technical experts and who had been employed for a long time by the manufacturers of the machine and who, so far as we can see, were disinterested witnesses. Their testimony and the testimony of men who had to do with the operation of these machines clearly indicates that both of these machines were operated without proper attention being given to the matter of lubrication, and the proper functioning of mechanical parts, especially after the machine K-48 had been submerged in water as the result of a flood, and had accumulated sand and grit in the housing containing the gears. This testimony we believe discharges the burden of proof which was upon the plaintiff to show that the machines were operated in a negligent and unskillful manner, and that the same were also damaged by reason of such negligent operation over and above ordinary wear and tear. It is a well-settled rule that where there is a bailment for mutual benefit the bailee in the absence of a special contract is held to the exercise of ordinary care in relation to the subject matter of the bailment, and is therefore, liable for negligence on his part, or on the part of his servants while acting in the course of their employment. It has further been held by our courts, (*Clemenson* v. *Whitney* 238 Ill. App. 308): "The better reasoning and the weight of authority is that where the bailor makes out a prima facie case of negligence against the bailee, by showing that the goods bailed have not been returned on demand, such prima facie case is not overcome by a showing, on the part of the bailee, to the effect that the goods have been burned or otherwise destroyed or have been stolen, but before the bailor's prima facie case can be said to be overcome, the bailee must further produce evidence tending to prove that such burning or loss or theft was occasioned without his fault."

We are aware that this rule does not operate to shift the burden of proof from the plaintiff to the defendant but simply places the burden of proceeding upon the defendant. It is true that the bailor must in all instances prove that the bailee was negligent, and when the bailor has made a prima facie case of loss and the

defendant has produced evidence that tends to show that he was not negligent, the bailor in order to make out his case must prove that the bailee was in fact negligent. This we think the evidence in this case proves.

The defendant-appellant contends that the damages allowed under counts two, three, four and five, were excessive, and that the findings of the court were against the manifest weight of the evidence and the law. The rental value of the tractors, as well as the rental value of the drag lines, we believe was established by ample evidence. It is true that in calculating the rental value of the drag lines the trial court in deducting the amount paid, $2,814.84, from the amount due, at the rate of $30.00 a day, assessed damages at $265.16, instead of $365.16. However, no cross-errors were assigned, and the amount should be permitted to stand. The damage resulting to machines K-48 and K-55 we believe is well established by the uncontradicted testimony as to the cost of the repairs made to put them in the condition in which they were when turned over to the defendant. The damages assessed we believe are properly measured by the cost of repairing occasioned by the negligence of the defendant, (*Lawndale Steam Dye Works* v. *Chicago* Daily News Co., 189 Ill. App. 565; *Donk* v. *Slata,* 133 Ill. App. 280; *Fitzsimons* v. *O'Connell,* 199 Ill. 390; *Latham* v. *C. C. C. & St. L.,* 164 Ill. App. 559), the court properly deducting from the amount of these repairs damages caused by ordinary wear and tear. The transaction between the plaintiff and the company repairing these machines was an ordinary business transaction and we see no reason why the court should evince any suspicion that the amount which the witnesses testified would be necessary would be unreasonable. (*Darling & Company* v. *Yellow Cab Company,* 238 Ill. App. 326; *Cloyes* v. *Plaatje,* 231 Ill. App. 183).

Defendant-appellant urges further ground for reversal that the court erred in ruling on the admission of certain evidence. This was in connection with a question put to a witness by counsel for the plaintiff as to the cost of putting the machine K-48 in the same repair or condition as it was on April 2, 1934. The question was objected to on the ground that it did not specify what kind of repair, and upon the question being put in its final form defendant's counsel renewed the objection previously made, assigning the same reason. It appears to us that this objection was interposed on the ground that the first question asked did not take into account ordinary wear and tear, but inas-

much as testimony was introduced to show what the ordinary wear and tear was we do not see how the admission of the testimony objected to could injure the defendant, particularly since the case was heard before the court and not before a jury, and further because two other witnesses testified to substantially the same facts without any objection being interposed.

For the reasons given, in our opinion, the judgment of the trial court should be affirmed.

Judgment affirmed.

(Fourteen pages in original opinion.)

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PUBLISHED IN ABSTRACT

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The People of the State of Illinois, Defendant-in-Error,

v. Cleatus Connolly, Plaintiff-in-Error.

ERROR TO COUNTY ~~Appeal from Circuit~~ *Court, Sangamon County.*

OCTOBER TERM, A. D. 1935. 283 I.A. 654

Gen. No. 8949 **Agenda No. 2**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

On June 30, 1934, a verified information was filed in the County court of Sangamon county, Illinois, charging the defendant, Cleatus Connolly, with having committed an assault and battery upon one Harry Elliott. The information charged the unlawful acts were committed "at Springfield, Sangamon County, Illinois, on June 26, 1934." Upon this information the defendant was arraigned and pleaded not guilty. Bond was given, and after various continuances when the cause came on for trial and the parties were present in court, on the motion of the State's attorney, leave was granted to amend the information upon its face by adding the following words: "Nineteen Hundred and Thirty-Four" in place of "1934" on line 9 of the information and then the following: "at the City of Springfield, in the County of Sangamon, in the State of Illinois." At the time that the State's attorney made the motion no objection was made by counsel for the defendant. In fact, he stated "No objection." A second verification dated January 14, 1935, was executed on the back of the information. Thereupon without the defendant being again arraigned nor a plea of not guilty entered the cause proceeded to trial before a jury, and a verdict of guilty returned. Motion on behalf of the defendant for new trial after argument was overruled by the court. Subsequently a motion in arrest of judgment was filed, setting forth that in the absence of the showing of an arraignment and plea to said amended information fatal error appeared upon the face of the record. After argument the court overruled said motion and entered judgment on the verdict. It is from this ruling of the court that this writ of error is prosecuted by the defendant to this court.

The only error relied upon for reversal is the ruling of the trial court denying the motion in arrest of judgment and entering judgment on the verdict. It is in-

sisted by the defendant-appellant that a plea of not guilty to an information is mandatory, and that until such plea is entered there is no issue to be tried. With this proposition we are in entire accord. It is further insisted that where an amended information is filed a new arraignment and plea is mandatory, and can not be waived. In support of this proposition are cited *People* v. *Economakas,* 278 Ill. App. 265; *People* v. *Evenow,* 355 Ill. 451; *People* v. *Ezell,* 155 Ill. App. 298. An examination of these cases discloses what we believe to be the true rule, and that is that if the amended information adds additional counts or changes the charge so that a new defense might be interposed, a new plea is required, but that where the amendment in no wise changes the offense charged, nor may require a new plea to present any further defense that the defendant by making no objection to the amendment, and proceeding to trial waives the necessity for a new plea, and cannot after trial, and verdict against him, for the first time raise this matter on a motion in arrest of judgment. Any defense which could have been raised under the amended information could have been raised under the plea of not guilty entered to the original information. This is in line with the case of *People* v. *Wancoski,* 209 Ill. App. 47, where the defendant was convicted in the county court upon an information charging the unlawful selling of intoxicating liquors. The thirty-first count of the information described certain premises as a certain room on the first floor of a certain one-story brick building, located at 1208 South Indiana avenue in the City of North Chicago. After the defendant had pleaded not guilty the state by leave of court amended said count by striking out the word "brick" in the description of the building, and inserting the word "frame". This was done after trial had begun, and after the plea of not guilty had been entered. The defendant did not plead to the count as amended, and the contention of the defendant there, as in this case, was that it was error to try the defendant without a plea of not guilty interposed after such amendment. In that case the court said, in quoting from *Truett* v. *People,* 88 Ill. 518, " 'If the amendment can give occasion to a new defense the defendant has leave to change his plea; if it can make no alteration as to the defense, he does not want it.' The word 'brick' was an unnecessary part of the description of the building and could have been stricken out without inserting the word 'frame' ". "We do not doubt that the parties proceeded with the understanding that the plea of not guilty previously entered still stood."

In the instant case if the words which were entered in the information by way of amendment had been left out there could be no doubt as to the time when the offense was alleged to have been committed, nor the place where it occurred, and since the attorney for the defendant when asked whether there was any objection to the amendment being made said "No objection" it appears to us that the parties in this suit likewise proceeded with the understanding that the plea not guilty previously entered still stood. Therefore, in our opinion the action of the trial court in overruling defendant's motion in arrest of judgment and entering judgment on the verdict was correct, and said action is, therefore, affirmed.

Judgment affirmed.

(Five pages in original opinion)

14 (65865)

Opinion filed January 17, 1936.

PUBLISHED IN ABSTRACT

S. H. Cummins, Administrator of the Estate of Ettie M. Cummins, Deceased, Plaintiff ~~Appellant~~ IN ERROR, v. City of Springfield, Illinois, Defendant ~~Appellee~~ IN ERROR.

ERROR TO ~~Appeal from~~ *Circuit Court, Sangamon County.*

OCTOBER TERM, A. D. 1935.

283 I.A. 655

Gen. No. 8959 **Agenda No. 32**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a suit in trespass to recover damages from the City of Springfield, allegedly occasioned by the building of a subway in the year, A. D., 1931, on South Grand avenue between Eleventh and Ninth streets, in said city. From the evidence introduced it appears that the Wabash Railway company maintained certain railroad tracks on South Grand avenue, and the construction of the subway referred to was for the purpose of lowering the grade of this street to carry the traffic of that thoroughfare beneath the tracks and road bed of the Wabash railway. The property of Ettie M. Cummins, who was living at the time this alteration in the grade of the street was made, abutted on Grand avenue. This suit was prosecuted by S. H. Cummins, administrator of the estate of the said Ettie M. Cummins, now deceased. The Cummins property was 145.8 feet in length and 40 feet wide, upon which stood a one-story brick front building, 39.6 feet by 36.2 feet, the front of the structure coincided with the front line of the Cummins property, the rear of the building being 80 feet from the rear of the lot. There was a driveway at the rear of the property, permitting ingress and egress to the street. In altering the street level the ground was excavated in front of the premises in question so that the street at the western boundary of the property was some 6 feet lower than it previously had been, and at the eastern boundary approximately 3 feet lower. In addition to lowering the street the slopes of the property in front of the premises belonging to Cummins had been walled with cement and an iron fence, 4½ feet in height, had been erected in front of the entrance to the building. The building was occupied by the Capital City Central Dairy Co. at

a rental of $65.00 a month. There appears to be no controversy about the fact that the rental was the same after as it had been before the street level was altered. The original pleading filed in the suit was a petition in the nature of a mandamus praying for a writ to compel the city of Springfield through its officials to file a condemnation proceeding against the property of Ettie M. Cummins, but since it appeared from the petition that the Grand avenue subway construction had been completed two years before and the street as lowered in front of the Cummins property was still within the north and south lines of the old street a demurrer was sustained to the petition, and upon motion the cause transferred to the law docket, and a declaration filed on the case for consequential damages to the Cummins property by reason of the construction of the subway. To this declaration, as amended, a plea of general issue was filed. On a trial of the cause by a jury the issues were found for the defendant, and the plaintiff ~~appellant~~ entered a motion for new trial, which motion the trial court overruled. From this order appeal is taken to this court, assigning as error, that the trial court erred in not setting aside the verdict of the jury and granting a new trial; in rendering judgment on the verdict of the jury; in refusing to admit proper evidence on behalf of plaintiff; in admitting improper evidence offered on behalf of defendant; in giving the following instruction to the jury: "That the facts and circumstances with reference to the premises involved as observed by you at the time of your visit to said premises as jurors in company with a bailiff of this Court, is evidence in this cause." "That the rights of the public in the real estate located between the north and south lines of South Grand avenue to use the same for street purposes were paramount of any private person included the right to lower the grade of South Grand Avenue for street purposes below the original ground level below the grade of abutting property and included the right in lowering the grade of South Grand avenue to remove the earth or soil between said street lines, provided, however, if in the exercise of such right by the city plaintiff's abutting property is diminished in value, plaintiff is entitled to be compensated in damages for such actual decrease in value, if any such decrease in value is shown by the evidence." "that the plaintiff under the evidence in this case is entitled to recover only his actual damages, and such actual damages are to be measured and are to be limited to the

actual sum shown by the evidence to be required to fairly compensate for the injury to his property, if any is shown by the evidence, as the result of the construction of said public improvement in South Grand avenue."

It is contended by plaintiff that he is entitled to damages for the construction of the subway on the theory that private property shall not be taken or damaged for public use without just compensation, and cites considerable authority to sustain this contention. While it is conceded that the plaintiff is entitled to recover actual damages resulting to his property by reason of the construction of the subway, he would not be entitled to a verdict, or judgment for money, unless by reason of the construction of the subway the property became less valuable, or the owner was placed in a worse condition financially as a result of the construction. This rule is expressed in the case of *City of Chicago* v. *Koff,* 341 Ill. 520, in which the court said: "In all cases where private property is taken for public use, the compensation to which the property owner is entitled is the amount of money necessary to put him in as good conditon financially as he was with the ownership of the property."

In this case none of the plaintiff's property was taken for or incorporated in the construction of the subway, and the property which had been previously used for street purposes continued to be used for that purpose, so that the only question was a question of fact, as to the amount of the indirect or consequential damages to the plaintiff or his property by reason of the improvement of the street. This, obviously, was a question for the jury, and in arriving at their verdict, they were required to consider all the competent evidence introduced which tended to show what effect the improvement had upon the property of plaintiff-~~appellant~~ IN ERROR or upon plaintiff-~~appellant~~ IN ERROR as owner of the property.

It is urged by the plaintiff-~~appellant~~ IN ERROR that the verdict of the jury should have been set aside, on the theory that the property was damaged by the improvement of the street. The jury considered not only the testimony of witnesses introduced on behalf of both parties but viewed the premises, and acting within their province to find the facts in the case returned a verdict for the defendant. We feel that the evidence offered in this case showing the rental received from the premises both before and after the construction of the subway was the same; that there was more traffic going

past this property; that the same means for getting in and out of the building by way of the rear driveway was still available; that the only impairment in the use of the property was the inability of persons to park vehicles between the curb line and the sidewalk in front of the premises; that the premises could be reached from the front without great difficulty; was sufficient to support the verdict of the jury.

It has been held by our Supreme court that where the benefits to the property resulting from the construction of a public improvement exceed any damages to such property by reason of the improvement, nothing can be recovered by the owner for damages. (*Village of Winnetka* v. *Clifford,* 201 Ill. 475; *Metropolitan* v. *Springer,* 171 Ill. 170. The question of whether such damage to the property existed by reason of this improvement was properly a question for the jury, which they answered by their verdict, the measure of damages being the difference as shown by the evidence in the fair cash market value of the premises before and after the improvement. (*Green* v. *City of Chicago,* 97 Ill. 370; *Illinois I & M. R. Co.* v. *Easterbrook,* 211 Ill. 624). Such evidence was introduced in this trial, and the jury answered the question by their verdict. On the same authorities we believe the instructions complained of were proper and no error was committed by the court in giving same.

It is urged by plaintiff-~~appellant~~ IN ERROR that the court erred when it excluded the question to and the answer of the witness Cummins wherein he stated that he had been offered $6,000 for the property. We feel that this contention is entirely without merit since the record (p. 98) shows, after a statement by the court relative to the witness, "He may state anything that is material if he has anything else, in answer to the general question," to which the witness answered, "I been offered —I was offered before the subway went in their $6,000 for the building." This was objected to, and the trial court said "let it stand." On page 106 of the record, in answer to the question, "What would you say was the reasonable value of that property just prior to the building of the subway?" the witness answered, "I was offered three or four times $6,000 for it." This was objected to and excluded by the court, which ruling we believe was proper since the answer was not responsive to the question. (*Math* v. *Chicago City Ry. Co.,* 243 Ill. 114; *City of Chicago* v. *McNally,* 227 Ill. 14).

For the reasons given the action of the trial court in overruling the motion of plaintiff-~~appellant~~ appellee for a new trial is affirmed.

Judgment Affirmed.

(Eight pages in original opinion.)

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Opinion Filed January 17-1936

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PUBLISHED IN ABSTRACT

The Paul Brothers Amusement Co., Incorporated, Appellant, v. William P. Dunn, Appellee.

Appeal from Circuit Court, Macoupin County.

OCTOBER TERM, A. D. 1935. 283 I.A. 655

Gen. No. 8914 **Agenda No. 3**

MR. JUSTICE FULTON delivered the opinion of the Court.

This is an appeal from a judgment for appellee in the sum of $745.57 entered by the Circuit Court of Macoupin County in favor of the appellee. The suit was in assumpsit and the declaration consisted of the consolidated common counts. To this declaration the appellant filed a plea of special contract and payment. By agreement the jury was waived and the cause tried before the Court.

The case is largely one of fact in which the parties are in direct conflict. It appears that in the year 1927 the Paul Amusement Company was the owner of a theatre in the city of Carlinville, which was destroyed by fire. The appellant procured the aid of the appellee in preparing an estimate to be used in adjusting the insurance loss. Appellee was a contractor and builder and had considerable experience in the construction of large buildings in the city of Carlinville and surrounding communities. Mr. Frank Paul, in behalf of the appellant, saw the appellee and solicited him to rebuild the theatre. The appellee and the appellant are not at all in accord as to the material portions of the contract entered into. There was no agreement in writing. The appellee's theory is that he was employed to rebuild the theatre for the appellant without any specific contract; that he had a large amount of equipment for building construction estimated to be worth $3,000.00 and which was used on the job; that he was compelled to buy other equipment for use on the building and that quite a portion of it was broken or destroyed during the period of construction; that he told Mr. Paul that he could secure carpenters who would work for 90 cents per hour, but that it would cost Mr. Paul $1.05 per hour, and that appellee would receive the difference in payment for his experience as a contractor and

builder, for the drawing of plans and specifications for the building, for his own labor on the building, for the use of his equipment and for keeping the time of all the labor employed. It was also agreed that appellee should secure compensation insurance covering all men employed on the work. There were three accidents, one major accident, during the process of work on the building. Appellee hired all of the laborers, kept their time and bossed the job. He worked the same as a journeyman carpenter and frequently assisted in doing the concrete work. He paid out the sum of $247.00 to the United States Fidelity and Guaranty Company for insurance policies covering this job. There were several contractors in the locality who testified that in cases of employment of builders without a specified contract they were entitled to commissions on certain portions of the labor employed.

The appellant's theory testified to by both Mr. and Mrs. Paul for the appellant is that a specific contract was entered into concerning the erection of said building, that appellee was employed to build the theatre building, employ the men, act as boss, etc., with the understanding that he carried compensation insurance, and as pay, appellee was to receive just a journeyman carpenter's wages; that appellant was to furnish and pay for all materials used; that at the end of each week appellee was to furnish to appellant a statement showing the price for labor on the building and appellant was to pay these bills as the work progressed.

The main controversy between the parties was whether appellee was to receive a journeyman carpenter's wage of 90 cents per hour for his entire service, or $1.05 per hour for all carpenter's services as testified to by appellee. At the end of each week the appellee would present a day book kept by him showing the amount of compensation due to all workmen including the appellee, and Mr. Paul would usually give the appellee a check for such amount and the appellee would pay all of the men. The appellant introduced all of these checks showing the total sum of money paid by him amounting to $10,653.40 and the last of these checks was given by appellant to appellee on the 28th day of January, 1928. At that time the building was completed and the last check in the sum of $120.50 was marked "In full".

At the time of the trial the small day book kept by appellee could not be produced. Appellee and his son testified that it was left in an office which, after the

building was completed, was moved away by Mr. Paul and could never be found. They further testified that appellee would take this small book home and that his wife copied the contents into another book which appellee called Journal; that appellee compared the small book with the Journal and found the Journal to be correct. The Journal was admitted in evidence on the theory that the small book had been lost and could not be produced.

Appellant argues mainly that the judgment should be reversed because of the statement on his last check that the same was payment in full and also that it was error for the Court to admit in evidence the so-called Journal. Appellee's answer to the endorsement on the last check "Paid in full" is that the check did not contain any such words and that the same were not written thereon when he received the check and cashed it. As to admissibility of the Journal, it seems to us that on the testimony of the appellee and his son as

to the loss of the original day book, the impossibility of producing the same and the correctness of the journal entries was sufficient to warrant the Court in permitting the use of the journal as secondary evidence.

On the main issue in controversy as to the terms of the contract, it seems incredible to us that a contractor and builder having the years of experience of appellee would agree to pay out the sum of $247.00 for compensation insurance, draw plans and specifications for the new building, use $3,000.00 worth of building equipment in the construction of the theatre, hire all of the laborers, carpenters, bricklayers and plasterers, keep their time and supervise and boss the job for a journeyman carpenter's wages of 90 cents per hour. The appellee claimed that he was entitled for his overhead and his insurance the sum of $1,465.00, but the Circuit Court found that appellee was only entitled to $745.50. Appellee was content to abide by the judgment of the Court. There was sufficient evidence to show that this amount did not exceed the amount paid out by appellee for insurance plus fifteen cents per hour for the carpenters on the job.

This is the second time this case has been presented to this Court on review. A prior judgment was reversed and the cause remanded mainly because the appellee failed to make any explanation of the check for $120.50, dated January 28, 1928, marked "In full", and because the original day book used for weekly

payments was not produced and no satisfactory testimony accounting for its absence. It seems to us that appellee has supplied that proof in this record, and two trials of this cause having been had in the Circuit Court without a jury, both resulting in a finding and judgment for appellee, where the trial judge had an opportunity of seeing and observing the witnesses testify, it would be improper for the reviewing Court to set aside this judgment unless the same appears to be against the manifest weight of the evidence. We believe the testimony adequately supports the findings of the Circuit Court, and that its judgment ought not to be disturbed.

Affirmed.

(Five pages in original opinion.)

14 (65865)

PUBLISHED IN ABSTRACT

Sam Edwards, Receiver of the Farmers and Traders State Bank of Manchester, Illinois (Beal B. Smith, Trustee for the Stockholders of the Farmers and Traders State Bank of Manchester, Illinois), Appellant, v. C. F. McCracken, Isabelle McCracken and Howard H. McCracken, Appellees.

283 I.A. 655

Appeal from Circuit Court, Scott County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8917 **Agenda No. 6**

MR. JUSTICE FULTON delivered the opinion of the Court.

On October 8th, 1931, the appellant entered a judgment by confession against the appellee C. F. McCracken for the sum of $6263.47 and costs of suit. Execution was issued on the judgment and returned no property found and no part satisfied. The said appellee, C. F. McCracken, filed a debtor's schedule listing all of his household goods and a few articles of chattel property, but did not include any money on hand or debts due and owing to him. The undisputed facts show that prior to 1919 the appellee C. F. McCracken owned and lived on a farm about 2½ miles north and west of Manchester in Scott County where he had resided for a great many years. Prior to 1919 he had owned some land and in that year purchased some additional land, making about 258 acres in his farm. At that time and prior thereto, a private bank was being conducted in Manchester, known as the Farmers and Traders Bank. In order to buy the additional land in 1919 C. F. McCracken borrowed of this private bank the sum of $12,000.00, giving his note therefor. Shortly thereafter the owners of the private bank were compelled, under the State Law, to incorporate and they organized the Farmers and Traders State Bank of Manchester. The new bank took over the assets of the former private bank and the C. F. McCracken note became the property of the new State Bank. Interest payments and some payments on principal were made and the note carried along and re-

newed in the bank until about 1925 or 1926 when the Auditor of Public Accounts declared the same an excess loan and ordered the bank to adjust the account. This was done by dividing the note, C. F. McCracken signing a note for $5500.00 and appellee Howard H. McCracken, son of C. F. McCracken signing a note for $3500.00, being the balance of the excess loan. The note for $5500.00 was carried along, interest paid and renewed from year to year. The $3500.00 has been paid in full.

On January 7th, 1931 the Farmers and Traders State Bank of Manchester closed its doors. On the same date Howard H. McCracken took his father, C. F. McCracken, and Isabelle McCracken, his wife, to Winchester where all of the said farm lands were conveyed by C. F. McCracken and wife to the son Howard H. McCracken. Two deeds were executed covering the land and each deed expressed a consideration of $5.00 and love and affection. On the same date both deeds were filed for record and recorded in the Recorder's Office of Scott County, Illinois.

A Receiver for the Bank was duly appointed and took possession of the assets and property of said bank, among which was the note of C. F. McCracken for $5500.00. Demand was made for the payment of said note, payment refused, and the Receiver placed said note in judgment for the sum above mentioned.

On March 16th, A. D. 1932 the appellant filed a Creditor's Bill in the Circuit Court of Scott County against the appellees C. F. McCracken, Isabelle McCracken and Howard H. McCracken, to set aside the deeds to Howard H. McCracken, and to subject the land therein described to the said judgment, setting up in substance the foregoing facts and charging in his bill of complaint that the deeds were executed on the part of the appellees with a fraudulent intent to hinder, delay and defraud the creditors of C. F. McCracken and to prevent the collection of the above judgment; that appellees knew that the closing of the bank would hasten the liquidation of said note; that Howard H. McCracken held the title to said lands in trust for the use and benefit of C. F. McCracken; and prayed that said deeds be set aside and held for naught; and that in default in the payment of said judgment that the lands be subjected to the lien of said judgment and sold to satisfy the same. Separate answers were filed by C. F. McCracken and Howard H. McCracken. The answer of C. F. McCracken admitted the indebtedness to the bank, the taking of the judgment, the issuing of

the execution, its return unsatisfied, but averred that he and his wife conveyed the said premises to his son on January 7th, 1931, and denied all other averments to the bill. The amended answer of Howard H. McCracken averred that he had bought a part of the land in question in 1919 and paid part of the purchase price on same; that later in about the year 1924 he entered into an oral agreement with his father, C. F. McCracken, whereby the latter agreed to convey all of said lands to said Howard H. McCracken for the sum of $20,000.00, a part of which had already been paid and the balance to be paid as the said Howard H. McCracken could earn and pay the same; that in 1929 C. F. McCracken removed from said premises and the said Howard H. McCracken had had complete and sole possession of said lands since 1930; that from the time of the agreement to date he had been making payments to his father, under said agreement, and still owed his father about $300.00; and that the deeds executed and delivered by his father and mother on January 7th, 1931 were made in pursuance of said agreement.

The cause was referred to the Master in Chancery to take the proofs and report the testimony to the court without conclusions. Upon the coming in of the report of the Master the cause was argued before the court and the court entered an order finding that the allegations of the bill were not proved by the testimony and dismissed the bill.

Appellant insists that the Trial Court committed error in holding by its decree that the conveyance of the real estate from C. F. McCracken and wife to Howard H. McCracken was not done or made for the purpose of hindering, defrauding or delaying the creditors of C. F. McCracken, nor for the purpose and with the intent of hindering and delaying the collection of the indebtedness of the said C. F. McCracken to the Farmers and Traders State Bank of Manchester or the Receiver thereof.

The testimony further shows that there were two sets of improvements on the McCracken farms and up to 1929 or 1930 C. F. McCracken and wife occupied one set of these improvements and Howard H. McCracken and family the other. Howard H. McCracken testified that in the autum or early winter of 1924 his father, then an elderly man, went to California for an indefinite stay. Before he left, he and the son made the agreement for the purchase of the lands by the son for the sum of $20,000.00; that at that time Howard H. McCracken took complete and full possession of the

two farms and has since remained in full and complete possession of the same, except one of the dwelling houses, in which his father resided after his return from California; that in February 1930 the father moved to Manchester and since then no one has lived on the farm or been in possession of any part of it except Howard H. McCracken. The father had no bank account after he went to California and continually drew on Howard's account for various amounts, by checks, all of which were introduced in evidence; that the whole sum of $20,000.00, with the exception of about $300.00, had either been paid directly by Howard H. McCracken at the time of the purchase of the second farm and subsequently thereto, or had been drawn by the father with checks upon the son's account, prior to the commencement of this suit. He further testified that after he took possession of the farms he paid all the taxes thereon from the year 1925; that on one occasion the cashier of the bank paid the taxes for him by check on his account in the Manchester Bank; that on another occasion the father paid the taxes by check signed by himself but paid out of Howard's account; that in every case of payment of taxes since the spring of 1925 the same had been paid out of Howard's account; that he, Howard, had made all repairs on the farms and had paid for the same and owned all the personal property on the farms and managed, controlled and operated them himself with his own equipment.

There is no direct testimony in conflict with this proof but it is urged by appellant that because the checks for the payment of taxes, checks for the buying of livestock and checks for the payment of labor were continually signed by C. F. McCracken; and that because of the secret oral agreement between the father and son for the purchase of the farm land, without any written memorandum of agreement, with no definite time of payment set, no mention of interest, no books and no mention of the other terms included in such an agreement; and because of the unsatisfactory proof of payment on the part of Howard H. McCracken of the $20,000.00 and because of the failure of C. F. McCracken in his debtor's schedule to mention the money due and owing to him by Howard H. McCracken; because of the relationship of the parties and close union of business affairs throughout the years, the closing of the bank, the trip to Winchester on the same date and the execution of the deeds, that

fraudulent intent is shown by the conduct of the parties and the consequences resulting therefrom.

The appellees contend that the appellant has wholly failed to prove any fraud on their part; that the burden of establishing fraud by the testimony is upon the party alleging it; that fraud is never presumed and must be proved, like any other fact, by convincing evidence. They say that the proof of appellees that when the second tract of land was purchased, Howard H. McCracken paid a part of purchase price; that a year later the fact that he paid $1000.00 more on the purchase price; the fact that he assumed and paid a note for $3500.00 given as a part of the purchase price; the fact that he made other payments to his father from time to time as he could afford to make them, which he says were part payments on the purchase price of the land in question; the fact that he paid the taxes on the land in question since 1925; the fact that he had been in exclusive possession of the land in question since February 1930; the fact that he has made all improvements and repairs on both farms since February 1925, and has operated the same with his own equipment, all tend to prove that the conveyances in question were not voluntary conveyances, but were made for a valuable consideration and that there is no testimony to contradict the same.

The question involved seems to be largely one of fact, and while the relationship between the father and son and the informality of their dealings with each other without written memoranda or contracts to support them are circumstances which might arouse suspicion, more definite proof is necessary to establish fraud. Manchester is a small place of about 358 inhabitants and most of the facts disclosed by the testimoney were well known to the officers of the bank. There is no direct testimony in conflict with the evidence of Howard H. McCracken, and in this case the appellant relies entirely on circumstances to prove the fraud. Fraud is never presumed when transactions may be fairly reconciled with honesty and must be proved by positive and convincing evidence. *McKennan* v. *Mickelberry,* 242 Ill. 117; *Carter* v. *Carter,* 283 Ill. 324. The evidence to establish fraud must be clear and must leave the mind well satisfied that the allegations are true. Something more than mere suspicion is required to prove allegations of fraud. *Grosch* v. *Mendota National Bank,* 239 Ill. App. 515. The party alleging fraud in the conveyance of property has the burden of establishing fraud by the pre-

ponderance of the evidence. *Merchants National Bank* v. *Lyon,* 185 Ill. 343.

One of the unusual circumstances pointed out by appellant is that the deeds were executed on the day the bank closed, but the proof shows that Howard H. McCracken called for his father and mother early that morning, drove them to the County Seat at Winchester and had the deeds prepared. The testimony of witnesses employed in the bank is that the bank opened as usual that morning, that it closed about ten o'clock and that it was determined and known that it would close only about fifteen minutes before ten. The bank has since paid one hundred cents on the dollar to each of its depositors and all of its creditors.

Another feature of the proof designated as extraordinary by appellant is the oral contract between father and son for the purchase of the lands at $20,000.00. The son testified that in the purchase of the additional land in 1919, $4000.00 of his money was used, although it was standing in his father's name at the bank; that on January 22, 1919, he gave an additional check on his own account for $1000.00 to apply on the purchase price of said land. This check was offered in evidence and bore the endorsement "Payment on Whitehead farm at the time of purchase Jan. 22". He further testified that when the agreement for purchase of all of the land from his father was made in 1924, his father allowed him $1000.00 per year for his work on the farm from 1919 to 1925, and the same was applied on the purchase price; that on December 12th, 1925, he paid by his own check the sum of $1000.00 to apply on the payment of the lands in question; that from 1925 down to the date suit was started his father drew checks on the sons account, all of which were to apply on the purchase price of the lands in pursuance of their agreement and understanding. The $1000.00 check and about 420 miscellaneous checks were introduced in evidence to prove amounts paid to the father.

While the manner of dealing between the father and son is somewhat unusual and lacks the definiteness that might be desired, we can hardly say that the facts and circumstances warrant any finding of the existence of the fraud charged.

It is our judgment that the appellant has failed to sustain the burden of proof necessary to prove the allegations of his complaint charging fraud. The decree of the Circuit Court of Scott County finding that the conveyances in question were not made for the

purpose and with intent of hindering and delaying the collection of the indebtedness of C. F. McCracken to the bank, or to defraud creditors is therefore affirmed.

Affirmed.

(Eight pages in original opinion.)

14 (65865)

$1.00

Opinion filed January 17-1936.

PUBLISHED IN ABSTRACT

Dottie Vancil, Guardian for Donald L. Vancil, Merrie H. Vancil, Dorothy A. Vancil, John H. Vancil and Richard E. Vancil, Minors, Appellee, v. Illinois Power and Light Corporation, a Corporation, Appellant.

Appeal from Circuit Court, Vermilion County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8923 **Agenda No. 12**

MR. JUSTICE FULTON delivered the opinion of the Court.

Dottie Vancil, as Guardian of her five minor children, appellee, brought suit in Assumpsit to recover the sum of $4,200.65 with interest for money invested by the Guardian in preferred stock of the Appellant, Illinois Power and Light Corporation. The case was tried before a jury who found a verdict for Appellee in the sum of $4,962.30, upon which a judgment was entered against Appellant, Illinois Power and Light Corporation, a public utility corporation furnishing electrice, gas and transportation service in the City of Danville.

The suit was brought prior to the adoption of the Civil Practice Act and was tried upon the fifth and sixth additional counts of Appellees declaration, the Common Counts, Affidavit of Merits and Bill of Particulars. The fifth additional count alleged that Appellee had Guardians funds belonging to her five minor children in the sum of $5,700.00, and on April 23rd, 1930, the Illinois Power and Light Corporation was the owner of and offering for sale to the public its $6.00 Cumulative Preferred Stock at the par value of $100.00 per share. That the Appellee invested $5,700.00 with the Appellant which Appellant accepted and received from Appellee, and as evidence of said investment issued and delivered to Appellee 57 shares of preferred stock. That at the time Appellant issued said stock it had notice and knew that the money so accepted and received belonged to the five minor children and was held by Appellee as Guardian. That the monies invested did not come within any of the investments authorized by the Statute for investments by a guardian and that the said investment constituted an illegal investment under the Statutes of Illinois.

That the monies so invested constituted a trust fund for money had and received by the Appellant for the use of Appellee. That subsequent to the making of such investment the Appellant refunded to the Appellee, upon her demand the sum of $1,400.00 for 14 shares of the stock surrendered by her and that the Appellant now has in its possession the sum of $4,000.00 which the Appellant has refused to pay to Appellee as such Guardian. That said monies, being a trust fund, bear interest at 5% per annum from April 23rd, 1930 and that Appellee tenders and offers to deliver up 40 shares of said stock to the Appellant upon payment to her of the said sum of $4,000.00 with interest.

The sixth additional count, in addition to the foregoing allegations, averred that on or about October 21st, 1932, the Appellee was in need of funds to pay for the support of said minors, demanded of the Appellant that it refund to her the sum of $300.00 for 3 shares of stock belonging to certain of said minor children which she offered to deliver to the Appellant, but that the Appellant refused to make said payment or to redeem said stock or take it back and refused to pay to the Appellee any sum whatsoever upon said demand; that by reason of the necessity of said minors the Appellee was compelled to and did go upon the open market and sell the said 3 shares of stock for which she received the net amount of $99.35; that Appellant had received from Appellee the sum of $300.00 for said stock and thereby the Appellee lost on account of said sale and refusal of the Appellant to refund to her the said monies, the sum of $200.65, which is due and owing from the Appellant, in addition to the amount due and owing on account of the said forty shares of stock still held by her.

The amended affidavit of merits set forth substantially all the facts alleged in the fifth and sixth additional counts of her declaration and also averred that the Appellant, by and through its authorized agent, Charles W. Johns, solicited the Appellee to invest the said guardianship funds and as a means of inducing the Appellee to invest the said monies the Appellant, through its duly authorized agent Charles W. Johns, agreed with the Appellee, that the Appellant, whenever requested so to do by the Appellee, would take up any and all of said shares of stock, convert them into cash and pay the Appellee the face value of said shares, to-wit, $100.00 per share; that the Appellee relied upon said agreement upon the part of said Appellant, by its duly authorized agent, and invested the sum of $5,000.00 as aforesaid, and that subsequent to

such investment, upon request of the Appellee, the Appellant did take up a portion of the shares of said stock, convert them into cash and pay to the Appellee the full face value of $100.00 per share, but that she still has in her possession, as guardian, 40 shares of stock which she has heretofore and does hereby tender and offer to deliver up to the Appellant upon the payment of the sum of $4,000.00, with interest at the rate of 5% per annum from April 23rd, 1930; that the Appellant refuses to pay said sum and that the said sum is still due and owing to the Appellee; that the claim of the Appellee against the Appellant is for the sum of $4,200.65 with interest at the rate of 5% from April 23rd, 1930 until paid.

The Appellant filed a plea of general issue and several special pleas. A demurrer was sustained to all of the special pleas, except the second, and fourth. The second plea, which was verified, averred that Charles W. Johns was not the duly authorized agent of the Appellant and that no agent, servant or representative of the Appellant was ever authorized by it or had any authority to agree with the Appellee that if the Appellee would purchase the said shares of stock that the Appellant would, whenever requested, take up any or all of said shares, convert them into cash and pay the Appellee the face value thereof and that no agent, servant or representative of the Appellant was ever authorized to enter into any such alleged contract or agreement as is set forth in Appellees declaration or any count thereof.

The fourth plea averred that no consideration or profit of any kind or character moved to the Appellant or was paid to the Appellant by the Appellee, or by any one else, to induce it to make the said supposed agreement, which was without any good or valuable consideration.

The Appellant also filed an affidavit of merits stating in substance, that the nature of the defense to Appellees demand is that the Appellant did not, through its authorized agent, solicit the Appellee to buy the stock mentioned in Appellees declaration and neither did the Appellant agree, nor was any servant, agent or represenative of the Appellant ever authorized to agree, with the Appellee that the Appellant would be at any time when requested take up said shares of stock or convert them into cash; that the said Charles W. Johns was not authorized to make any such agreement for the Appellant; that the Appellant was a public utility and had no power to enter into any such agreement; that the Appellant was subject to the rules

and regulations of the Illinois Commerce Commission and that no authority had ever been granted by the said Commission authorizing the sale or issuance of the stock of Appellant on the terms set forth in the Appellees declaration for a re-purchase of said stock from said Guardian; that the Appellant did not sell the stock to the Appellee or authorize any one to sell or deliver said stock to her; that the Appellee did not receive any money from the Appellant for the re-purchase of any of said stock and that Appellant did not take back from the Appellee any of the stock so issued and repay to her the purchase price thereof and that it does not have any money in its hands or possession belonging to the Appellee as Guardian.

Upon the trial and at the request of the Appellant the Court submitted to the jury two special interrogatories. Special interrogatory number one was as follows: "Was the Illinois Power and Light Corporation the owner of the shares of stock in question at the time the same were purchased by the Plaintiff, Dottie Vancil, as Guardian?" Special interrogatory number two was as follows: "Did the Illinois Power and Light Corporation receive the money on the checks issued by the Plaintiff for the purchase of the shares in question?" Both of said interrogatories were answered, "Yes", by the Jury, which also returned a general verdict in favor of the Appellee in the sum of $4,962.30. Judgment was entered upon the verdict for this amount and this appeal is prosecuted to reverse said judgment.

Appellant urges many reasons for a reversal of said judgment but in the view we take of the case it is only necessary to consider whether or not the Appellee succeeded, by competent proof, in proving the essential allegations of her declaration and whether or not the verdict was against the manifest weight of the evidence. The Appellees testimony consisted almost solely of her own oral testimony and certain documentary evidence introduced as exhibits. She testified that on March 31st, 1930, she had in her possession as Guardian $5,700.00 belonging to her five minor children. At the solicitation of one C. W. Johns, she was persuaded to invest the said funds in six per cent cumulative preferred stock of the Illinois Power and Light Corporation. She appeared in the Probate Court of Vermilion County and procured an order authorizing her to make such investment. Each certificate of stock showed on its face that the said stock was issued to Dottie Vancil, as Guardian, for a certain

named minor and showing the name of the minor for whose use it was issued. The order was procured by her own attorney and was approved by the surety company which was on her bond. She gave a specific check, one for each minor, payable to the order of the Illinois Power and Light Corporation in payment for the said stock. All of said checks were endorsed by the Illinois Power and Light Corporation to Power and Light Securities Company which endorsement appeared upon the back of each of said checks. The Appellee, as such Guardian there after returned 14 shares of this stock through the said Charles W. Johns and the checks she received for this stock were the checks of the Power and Light Securities Company. She further testified that later she presented other shares of said stock to the Appellant which it refused to accept and returned the money to her as such Guardian. Subsequently, she sold 3 shares of the said stock belonging to the said minors in the open market and received therefor the sum of $99.35. It is the theory of the Appellee that the money of her wards was illegally invested because the Statute of the State of Illinois provides specifically as to the investment of funds belonging to minors and that the stock of the Illinois Power and Light Corporation was not such a security as was contemplated by this Statute. See Chap. 64 Par. 22, Cahill's R. S. 1930. The testimony of Appellee further shows that C. W. Johns had his office in the building where the offices of the Illinois Power and Light Corporation were located; that he had a brass tablet upon his desk stating upon its face, "Investment Department"; that he gave receipts for stock marked, "Shares to be cashed." These receipts were signed, "Illinois Power and Light Corporation, C. W. Johns, E, Investment Dep't." The Appellee further testified that she also talked with Harry Payne who appears to have been the Division Manager for Appellant located in the City of Danville, Illinois.

Appellee insists that because of Mrs. Vancil's testimony that C. W. Johns was trying to sell her Illinois Power and Light Corporation stock; because his office was located in the Illinois Power and Light Corporation building; because he gave receipts for the stock returned, signed as follows, "Illinois Power and Light Corporation, C. W. Johns, E, Investment Department;" because the checks in payment for the stock were made payable to the Illinois Power and Light Corporation, the evidence was sufficient to prove the essential allegations of the declaration. The evidence for the Appellant showed that the Power and Light

Securities Company purchased a large block of Preferred stock of the Illinois Power and Light Corporation on August 1st, 1929; that the stock purchased by Appellee on March 31st, 1930, for which they paid more than two million dollars, was a part of the stock owned by the Power and Light Securities Company; that the stock was sold to the Appellee by Charles W. Johns, who was acting as sales agent for Power and Light Securities Company that the said C. W. Johns was registered as a solicitor and agent under the Illinois Securities Law for the Power and Light Securities Company; that the several checks issued by Appellee in payment for the stock were all endorsed by Illinois Power and Light Corporation to Power and Light Securities Company; that when she returned some of the shares for sale she was paid by the check of Power and Light Securities Company. The testimony of Appellant further showed that the Illinois Power and Light Corporation was not the owner of the shares purchased by the Appellee nor did it receive any of the proceeds from the sale of the shares to the Appellee or pay any commissions therefor. The Power and Light Securities Company was engaged in the business of selling blocks of stock of the Appellant Corporation and also other Utility stocks. Some of the men who were officers and directors of Illinois Power and Light Corporation were also officers and directors of Power and Light Securities Company but the officers and directors were not identical.

It is our judgment that the Appellee did not prove by competent evidence that she purchased this stock from Illinois Power and Light Corporation. Her conclusion that C. W. Johns was the authorized representative of the Appellant cannot be considered as proof of his agency or his authority to bind that corporation. The other features of Appellees testimony tend to show that there was co-operation on the part of Appellant in the sale of their stock by the Power and Light Securities Company but this is not an action based upon conspiracy or fraud and deceit and it was necessary for Appellee to prove that she purchased the stock from the Illinois Power and Light Corporation and that it accepted and received the money, from the Guardian in payment for said stock. The issuance of the checks to Illinois Power and Light Corporation and the endorsement by Illinois Power and Light Corporation to Power and Light Securities Company does not prove that Appellant accepted and received the money from the sale of the stock.

In the case of *United Boiler Heating & Foundry Co.*, v. *Ackerman-Quigley Printing Co.*, 236 Ill. App. 111, the Court says:

> "But the trial court was in error in holding that the delivery of the check to the plaintiff had the same legal effect as a "transfer" of so much money. If this means anything, it means that the court held that the delivery of the check to the plaintiff amounted to an assignment, pro tanto, of the money of the defendant on deposit with the bank. Such is not now the law in this State. By section 188 of the Negotiable Instruments Act, (Cahill's Ill. St. Ch. 98, par 210) it is provided that a "check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check * * * *. It has never been accepted or certified, and therefore has never at any time become "the same as money transferred."

The further allegation of the declaration averring that the monies invested by the Appellees with the Appellant constituted trust funds of the money had and received by the Appellant to and for the use of the Appellee, and that said funds are impressed with said trust and are held by the Appellant subject thereto, is wholly without evidence in support thereof because there is no competent testimony to show that the Appellee invested any money with the Appellant and no proof to show that any trust fund was accepted or received by the Appellant. It is necessary before any kind of a trust can be created that it must be based upon a particular fund. *Reynolds* v. *First National Bank* 279 Ill. App. 581.

It is our belief that the Appellee offered no proof which sustained the allegations of the declaration that the Appellant was the owner of and sold to the Appellee as Guardian its cumulative preferred stock and no proof that the Appellant accepted and received the money paid by the Guardian for the sale of said stock and no testimony that the monies so received constituted a trust fund. Under these circumstances it was the duty of the trial Court to direct a verdict in favor of the Appellant for the reason that the Appellee failed to prove the essential allegations of her declaration and because the verdict of the jury is against the manifest weight of the evidence. The judgment of the Circuit Court must be reversed.

Reversed.

(Ten pages in original opinion)

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.70R

Opinion filed January 17-1936

PUBLISHED IN ABSTRACT

92

In the Matter of the Estate of Elizabeth K. Adams, Deceased, Marshall Davis, Appellant, v. H. W. Rice, Appellee.

Appeal from Circuit Court, Macoupin County.

OCTOBER TERM, A. D. 1935. 283 I.A. 655

Gen. No. 8928 **Agenda No. 15**

MR. JUSTICE FULTON delivered the opinion of the Court.

This appeal comes from the Circuit Court of Macoupin County on an order approving the final report of Appellee as Executor of the Last Will and Testament of Elizabeth K. Adams, deceased. Elizabeth K. Adams died on the 25th day of October A. D. 1923, and on the 24th day of November A. D. 1923 Letters Testamentary were issued to H. W. Rice, Appellee, as the Executor named in her last Will and Testament. An inventory was filed by Appellee, as such Executor, and approved by the Probate Judge on the 12th day of February A. D. 1924. A current report was filed by the Executor and approved on February 4th, 1925. No further reports were filed until the final report of the Executor. Objections were filed by Appellant and upon hearing the objections were overruled and the reports approved, by the Probate Court. The objections were heard in the Circuit Court on appeal and the reports were approved by that Court.

The main objections to the reports were that certain claims were paid without ever having been filed or allowed by the Probate Court, a number of which were barred by the Statute of Limitations; that one particular claim was paid in the amount of $100.00 more than was allowed by the Court; and that the Executor paid a Federal Estate Tax on real estate which had been conveyed by the decedent some seven or eight years prior to her death.

Specific objections were filed to the payment of the following claims in the first report of the Executor:

Jones Lumber Company	$ 350.00
Union Drainage Tax	79.50
L. E. Dugan (baling)	61.05
Proportionate part of 1923 taxes	925.00
H. W. Rice	1,000.00
E. C. Richards	72.00

Mary S. Teters	100.00
Federal Estate Tax	910.06

and in the second and final report as follows:

E. C. Richards	72.00
Drs. Bley & Bley	56.75
Insurance	2.00
Jones Lumber Company	245.05
Alexander Lumber Company	152.70
	$4,026.11

The testimony shows that Appellee had acted as the agent for the deceased for a period of about three years. The services, as agent consisted of the handling of about 2,000 acres of land and a considerable amount of personal property. A few years prior to the death of the decedent, she and her husband, had conveyed this property to their daughters subject to the life use of the decedent.

The testimony consists entirely of the direct and cross-examination of the Appellee and the reports and documentary proof but no other oral evidence was introduced by either Appellant or Appellee.

The objection to the first item, being the Jones Lumber Company account, on which credit was taken in the first report for a payment of $350.00 and in the second report for a balance of $245.05 was that the claim was never allowed or exhibited to the Probate Court, has no verification attached and is barred by the Statute of Limitations. The record does not appear to sustain this objection. An itemized account was filed by the Jones Lumber Company, verified by F. C. Kelly as manager, and presented to the Executor for the sum of $595.05. The Appellee testified that the material for which this claim was presented was for lumber and building material furnished in the erection or repair of a barn upon some of the farm premises. The contract was entered into during the lifetime of the decedent and the bulk of the items furnished before her death. There is no basis for the objection that this claim was barred by the Statute of Limitations.

The second item objected to was the payment of $79.50 for an installment of the Union Drainage Tax on certain farm lands because the same was neither filed nor allowed as a claim by the Probate Court, was not verified and barred by the Statute of Limitations. With his report however, the Executor filed the formal receipt of the Treasurer of Union Drainage District No. 3 being the amount of an installment of $75.00 plus

interest of $4.50, which installment was due and payable on October 1st, 1922. The payment was made on January 29th, 1924. As the decedent was the owner of the life use in the lands assessed we believe it was perfectly proper for the Executor to pay this installment of drainage tax and that the same was not barred by the Statute of Limitations.

The objection to the payment of $61.05 to L. E. Dugan was that the account was never filed as a claim against the Estate and if allowable at all should have been credited on a note owned by Dugan to the testatrix at the time of her death. The Appellee testified that Dugan was employed to bale some hay on one of the farms; that Dugan refused to bale the hay unless he was paid in cash for the same and therefore he was obliged to make the contract providing for cash payment for the work and labor of Dugan in and about baling the hay.

The objection to the payment to the Proportionate Share of the 1923 taxes in the amount of $925.00 is in the same class as the payment of the installment of Drainage Tax. The taxes had been levied and assessed and became a lien on the lands during the lifetime of Mrs. Adams and she being a life tenant was liable for and should pay the proportion of the taxes for the year 1923 up to the date of her death. While no claim was filed and allowed for this payment the item was contained in the current report of the Executor which was approved by the Probate Court.

Perhaps the most serious objection was the next item, being the claim of the Appellee, H. W. Rice for the sum of $1000.00 covering his services as agent for the decedent in managing her business affairs from May, 1921 to and including November 1st, 1923. These services consisted of renting the farms and collecting the rents therefrom, paying the taxes and other services in connection therewith for three successive seasons in addition to services performed as Executor in settling the Estate. The Appellant contends that this claim was not presented nor exhibited to the Court within one year and more specifically that there was no special Administrator appointed to pass upon it in the Probate Court in compliance with the Statute. While it is true that the better practice is for an Executor to file his claim, the same as a stranger, and have the Court appoint some discreet person to defend for the Estate, still it is not mandatory and the Probate Court in its discretion may allow such claim, either upon the presentation thereof or approve the

same in the report of the Executor, if he feels that the claim is just and proper. The report was not filed for more than one year after the issuance of Letters in the Estate but the receipt of the Appellee, H. W. Rice, shows the payment to himself of the full amount of this claim on August 19th, 1924. If the Probate Court was satisfied of the regularity, validity and justness of this claim we do not feel that there was an abuse of his discretion in allowing the same.

The objection to the two items of $72.00 each, one in the first report and one in the second report, paid to E. C. Richards appeared to be well taken. The testimony indicated that these amounts were paid by the Appellee to the Supervisor of the Poor to help a relative of testatrix's deceased husband. There seems to be no authority in law which empowers an Executor to make payments of this character. As to these two items we believe that objections should have been sustained.

The next objection urged is to the claim of Mary S. Teter in which Appellant claims, that the claim was allowed by the Probate Court at the sum of $1052.50 but the Appellee, as Executor paid the claim in the amount of $1152.50, being $100.00 more than allowed by the Probate Court. The only oral testimony introduced on this claim was that of the Executor who insists that the amount of $1152.50 is correct. The claim made out and sworn to by Mary S. Teter, the claimant, was for the sum of $1152.50 but on the back of the claim is a consent to the allowance of the claim at $1052.50 signed by Rinaker & Rinaker, as attorneys for the Executor. There is also endorsed on the back of the claim an allowance by the Probate Court at the sum of $1052.50. The Appellee testified that this was a mistake as there was no objection to the amount of the claim as presented; that he therefore paid the full amount and presented the receipt therefore signed by the claimant for $1152.50. Apparently the Probate Court was convinced of the truth of Appellee's testimony and there being no proof that the claim for the full amount was not just and proper we feel that the Probate Court correctly allowed the payment by the Executor for the full amount.

Appellant also objects to the item of $910.06 paid for Federal Estate Tax. He insists that the total amount of assets in the estate, as shown by the inventory, did not exceed the sum of $25,000.00 and therefore there was no justification for paying any Federal Estate

Tax whatsoever because of the exemption of $50,000.00 to be deducted before the Estate was liable to any tax whatever. The testimony of the Executor is that he was compelled to pay a Federal Estate Tax on the land conveyed by the decedent and her husband to the daughters several years before the death of Mrs. Adams. There seems also to have been paid an additional sum of $541.31 for inheritance tax which the Executor has not charged up in his account. He testified that there was a hearing with reference to assessing the Federal Estate Tax and that an appeal was taken by the Estate and the amount fixed for payment on appeal. We can see no reason why the Executor was not obliged to pay the Federal Estate Tax and it was proper for him to take credit for this amount in his accounts to the Probate Court. The receipt was signed by the Collector of Internal Revenue for the sum of $910.06, showing conclusively that that amount was paid by the Executor for Federal Estate Tax.

Appellant next objects to account paid to Drs. Bley & Bley in the sum of $56.75. The claim shows that it was not presented to the Executor until May 4th, 1925 and that he issued a check therefore on May 5th, 1925, which was long after the year had expired for filing claims. Although Appellee testified that he knew Drs. Bley & Bley had attended the decedent during her last illness and that he thought the bill ought to be paid still it was the duty of the Executor to interpose the defense of the Statute of Limitations under such circumstances and the Probate Court should have sustained an objection to the allowance of this item.

The next item of $2.00 for insurance appears to have been improperly paid out of the Estate monies and objection should be sustained thereto.

Appellant objects to the item paid to the Alexander Lumber Company amounting to $152.70. The testimony shows that this lumber was purchased after the death of the Testatrix and went into a house that was built for the benefit of Marshall Davis; that the bill should have been paid out of funds belonging to Davis instead of from the Estate. Objection to this claim should have been sustained by the Probate Court.

The Appellee apparently acted as the agent for this estate as well as Guardian for Marshall Davis, who is now the Appellant on this appeal. We feel that his accounting to the Probate Court was honest in every particular but that he failed to comply with all the requirements of the Statute with reference to some of these claims. Because of the reasons set forth in this

opinion it is impossible for us to affirm the judgment of the Circuit Court in toto although we have a feeling that the Executor was equitably entitled to the approval of his entire report. We have indicated the objections which should be sustained and the judgment of the Circuit Court is therefore reversed in part and remanded with directions to the Circuit Court to direct the Executor to state an account in accordance with the views expressed in this opinion.

Reversed in part and remanded with directions.

(Seven pages in original opinion)

14 (65865)

opinion it is impossible for us to affirm the judgment of the Circuit Court in toto although we have a feeling that the Executor was equitably entitled to the approval of his entire report. We have indicated the objections which should be sustained and the judgment of the Circuit Court is therefore reversed in part and remanded with directions to the Circuit Court to direct the Executor to state an account in accordance with the views expressed in this opinion.

Reversed in part and remanded with directions.

(Seven pages in original opinion)

14 (65865)

Abstract

.302

Opinion filed January 17-1936.

PUBLISHED IN ABSTRACT

93

Alma Shaffer, Appellee, v. The Prudential Insurance Company of America, a Corporation, Appellant.

Appeal from Circuit Court, Vermilion County.

OCTOBER TERM, A. D. 1935. 283 I.A. 656

Gen. No. 8933 **Agenda No. 18**

MR. JUSTICE FULTON delivered the opinion of the Court.

This was an action in assumpsit to recover for the debt of insured under an insurance policy. There was a verdict for Appellee in the sum of $500.00 and judgment on the verdict, from which this appeal is prosecuted.

The complaint consisted of four counts alleging that Appellant issued a policy of insurance on February 13th, 1933 against death, with double indemnity for death by accidental means. The first count set up that insured was beaten and strangled to death on January 19th, 1934 by unknown persons. The second count alleged that the insured was struck and beaten by unknown persons and died as a result thereof. The third count alleged that the insured met his death from bodily injury, namely, blows and strangulation. The fourth or additional count merely alleged death while the policy was in force. The answer denied the allegations of the complaint, alleged a tender in Court of premiums paid on the policy, set up that the deceased made false statements and representations as to his health in the application for insurance; that the insured died from suicide within one year from the date of the policy by strangling himself to death through hanging and that therefore nothing was due Appellee except premiums tendered.

The facts show that the insured Clarence Shaffer, applied for and was issued a policy of insurance from the Appellant Company. The policy provided for $500.00 for death through natural causes and an additional $500.00 in case of death through external, violent and accidental means but further provided that in case of suicide, sane or insane, within one year, the premiums paid should be the only liability.

The testimony further discloses that deceased left his home about noon on January 19th, 1934; that he was seen by one witness in a tavern during the after-

noon where he drank a glass of beer; by another on the street in the afternoon and by another about midnight. All testified that he was sober and apparently in good health and spirits. He was found hanging in one corner of a box car on a railroad siding near the Village of Westville on the following morning. He was hanging by a trousers belt and had another belt in his coat pocket which had been broken in two. His feet were three inches from the floor and there were clinkers in the car near the feet. A brother testified that the cap of the decedent was sticky with blood, both inside and out. This statement was denied by other witnesses and the cap produced as an exhibit showed little or no signs of any blood. The belt, by which deceased was hanging, was not his belt but the brown belt found in his pocket, broken in two parts, was the belt which he wore when he left home on the morning of January 19th. The belt left an indentation under the chin and up the sides of his head. There was a slight mark under his chin and a bruise on the back of his ear, according to the testimony of a brother and a son of the decedent. The evidence further showed that an overcoat was found about forty feet from the car, the afternoon they found him which was torn badly. A witness, Lena Ruckus, testified that she had given this coat to a tramp the week before. A small piece of old bailing wire was found twisted loosely around one wrist of the decedent. It was also testified that it was a custom for tramps and hoboes to hang out in cars in this vicinity.

Appellant argues many reasons for a reversal of this judgment but the controlling question in our minds is whether or not there is sufficient evidence to support the amount of this verdict. From the evidence in this record it is clear that the decedent was either killed or that he killed himself. There is no proof of death from any natural cause. If he was murdered his wife was entitled to the sum of $1000.00 because of death through violent or accidental means. If he committed suicide she was only entitled to recover the amount of premiums paid on the policy. The finding of a verdict of $500.00 must have been a compromise on the part of the jury and is not warranted by any facts proved in this record.

The theory of the Appellee is that some unknown tramp murdered the decedent but there is no motive shown for a murder and no facts which justify such a conclusion. It is our opinion that the verdict of the jury was not only manifestly against the weight of the evidence but that it was a compromise verdict

which cannot stand because it is not substantiated by any competent proof. *Selamakos* v. *Victor Ice Cream Co.*, 246 Ill. App. 178.

The judgment of the lower Court is contrary to the law and the testimony and is reversed and remanded.

Reversed and remanded.

(Three pages in original opinion)

14 (65865)

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Opinion filed January 17, 1936.

PUBLISHED IN ABSTRACT

94

Everett E. Smith, Appellant, v. A. H. Skelton, Appellee.

Appeal from Circuit Court, Vermilion County

OCTOBER TERM, A. D. 1935. 283 I.A. 656 2

Gen. No. 8945 **Agenda No. 24**

MR. JUSTICE FULTON delivered the opinoin of the Court.

Appellant filed his complaint in the Circuit Court of Vermilion County seeking to enjoin the Appellee from dispossessing Appellant from fifty-seven acres of land and to compel Appellee to specifically perform a written contract and convey to him said tract of real estate. The contract made time of the essence of the contract and the contention of the Appellant is that the Appellee, by his conduct, waived strict performance and that the Appellant was entitled to definite notice to perform before the contract could be terminated and that such notice was not given. Upon a hearing the Court dismissed the complaint for want of equity and this appeal is prosecuted to reverse that decree.

The facts show that on August 12th, 1933 the contract was executed which provided for the payment of a purchase price of $2600.00, payable $400.00 on April 1st of the years 1934, 1935, 1936 and 1937, and $500.00 on April 1st of the years 1938 and 1939, with interest at 6% per annum, payable April 1st of each year; also provided that the Appellant should pay all taxes and insurance, and if he mined any coal from the land should pay twenty-five cents per ton royalty to the Appellee in addition to the stipulated annual payments. On October 27th, 1933, Appellee loaned the Appellant the sum of $55.60 in cash, and on December 5th, 1933 the Appellant had mined and removed enough coal to make the sum of $102.26 due for royalty. On the same date the Appellant paid the Appellee the sum of $76.00, which was the only sum ever paid by the Appellant in cash upon the contract. On April 1st, 1934 the Appellant owed to the Appellee for insurance, taxes, royalty and the first installment on principal the sum of $791.27. On May 24th, 1934 Appellee served a notice in writing upon the Appellant attempting to forfeit the contract for failure to pay the royalty. On July 17th, 1934, Appellee caused a formal

notice in writing to be served upon the Appellant stating the specific items wherein Appellant was in default under the terms of the contract and a further formal notice that a proceeding in forcible detainer would be instituted to recover possession of the premises after thirty days from the date of the receipt of that notice by the Appellant. After the expiration of the thirty days the Appellee caused another notice demanding immediate possession of the premises in controversy to be served upon the Appellant as a basis for bringing a suit in forcible detainer. Subsequently suit was brought in forcible detainer against the Appellant by the Appellee before a Justice of the Peace. The case was tried before a jury in the Justice of the Peace Court and there was a verdict in favor of the Appellee for the possession of the land in question and a judgment for possession entered by the Justice on August 30th, 1934. No appeal was taken from the judgment.

Afterwards the Appellant filed a proceeding in the Federal District Court at Danville under the Frazier-Lemke Act and procured an order restraining the Appellee from taking possession. Later on September 14th, 1934, upon motion of the Appellee, the restraining order was dissolved by the Federal Court. This proceeding was thereupon filed in the Circuit Court on September 22nd, 1934. In the meantime a writ of restitution was issued by the Justice of the Peace upon the judgment for possession theretofore entered in that Court and the Appellee recovered possession of forty-seven acres of land in question from the Constable under that writ but, through leniency to the Appellant, did not dispossess him of ten acres of the tract on which the Appellant resided. Appellant then approached the Appellee and told him he thought he could get a loan from the Federal Land Bank of St. Louis if Appellee would let him have the land. The Appellee figured up the amount of the contract, interest, taxes and costs, which at that time came to $3,-142.23, and told the Appellant that if he could get a loan from the Federal Land Bank to pay him that amount on or before March 1st, 1935, he would let him have the land but also told him that such offer should not interfere with Appellee's holding possession of the land under the judgment in the Justice Court. An Application was made for the loan and the Federal Land Bank made the appraisal but on April 24th, 1935 definitely refused the loan. Thereupon the Appellee insisted upon the Appellant giving up possession of the ten acres and notified Appellant that the writ of

restitution would be enforced if he did not do so. The Appellant then amended his complaint in this cause on May 22nd, 1935 and sought to enjoin the execution of the writ of restitution averring that on or about November 15th, 1934 the Appellee had made a new agreement with the Appellant to convey him the fifty-seven acres of land for $3200.00.

On the trial the Appellant testified that he had made valuable and lasting improvements on the premises and also substantial repairs; that he also opened up a road on the premises and uncovered a considerable quantity of coal.

While there are other points argued in the briefs the only one seriously contended for by the Appellant is that because of the conduct of the Appellee he thereby waived the time of performance and that the original contract entered into between the Appellant and the Appellee could only be terminated by the Appellee giving additional definite, specific and reasonable notice of his intention to forfeit the contract and that no such notice was given. The facts upon which Appellant bases his contention are that on or about November 15th, 1934, the Appellee joined with the Appellant in making an application to the Federal Land Bank for a Federal Farm Loan on the property with which to pay the original purchase price specified in the contract of $2,600.00 and other items of indebtedness due and unpaid under said contract making a total of approximately $3,100.00. In the application it was stated that the loan was being made to pay off the balance of the indebtedness due on said written contract. Also that Appellee agreed to accept said amount in full payment of said indebtedness if paid before March 1st, 1935. Appellant urges that under these circumstances Appellee granted an extension of time in which to pay said indebtedness and that no other notice of intended forfeiture was ever served upon the Appellant as required by law. He relies almost exclusively upon the cases of *Eaton* v. *Schneider,* 185 Ill. 508. In that case the Appellee Schneider expressly extended the time for payment and permitted the time for payment to go by without declaring an immediate forfeiture and by his conduct led the Appellant Eaton to believe that he did not intend to insist upon an immediate performance of the contract according to its terms. The Court properly held in that case that where a party to the contract had led the other into the belief that strict performance will not be required a forfeiture can only be declared, after waiver, by giving definite and specific notice of his intention to terminate the contract.

We do not believe the facts in this case are comparable to those in the case of *Eaton* v. *Schneider*. There is no testimony in this record to show that Appellee ever expressly extended the time for payments. A contrary intention was shown by his service of a written notice to forfeit the contract upon Appellant for failure to pay royalty in May 1934; also his service of a thirty day notice prior to the institution of a forcible detainer suit; also his service of another notice demanding immediate possession before the institution of a suit; also his starting suit for possession, trial of a case before a jury, securing a judgment for possession and issuing writ of restitution based upon said judgment. This action was taken by Appellee only after default made by Appellant in the payment of royalty, interest, taxes, insurance and principal payment due on the contract. The fact that he told Appellant that if he could borrow the amount of money necessary to cover the entire indebtedness that he could have the land does not in our judgment waive the time of payment provided in the contract.

The fact that Appellant made a tender or offer of payment at the time of the trial does not change or vary the rights of the Appellee in this case. We believe that the testimony concerning the waiver of the time of payment and other rights of Appellant might properly have been raised in the forcible detainer suit before the Justice of the Peace. *Fuchs* v. *Peterson*, 315 Ill. 370. *Brown* v. *Burke*, 155 App. 249.

We believe that the Appellant failed to prove the allegations of his complaint and that the Court properly dismissed the same for want of equity.

Affirmed.

(Five pages in original opinion.)

14 (65865)

Opinion filed January 17, 1936.

PUBLISHED IN ABSTRACT

95

National School Equipment Company, a Corporation, Appellee, v. Board of Education No. 15 of Hancock County, Illinois, Appellant.

Appeal from Circuit Court Hancock County.

OCTOBER TERM, A. D. 1935. 283 I.A. 656

Gen. No. 8956 **Agenda No. 30**

MR. JUSTICE FULTON delivered the opinoin of the Court.

This is a companion case to the suit of *Seither & Cherry Co., a corporation* v. *Board of Education of District No. 15* in the Town of La Harpe in Hancock County, Ilinois, Gen. No. 8957, decided at this term. The facts, although differing in detail, and as to parties and amounts, are in substance the same. The same questions as to practice and procedure and the setting aside of default judgments are involved. The Circuit Court of Hancock County rendered judgment against the Appellant for the sum of $6509.96 and refused to set aside the judgment taken by default on motion of the Appellant. It is from this judgment the present appeal was taken.

Upon the authority of our holding in the above named case the judgment of the Circuit Court is therefore affirmed.

Affirmed.

(One page in original opinion.)

14 (65865)

Opinion filed January 17, 1936.

PUBLISHED IN ABSTRACT

Edward Kibbat, Appellee, v. May L. Clokey, Appellant.

Appeal from Circuit Court, Pike County.

OCTOBER TERM, A. D. 1935.

Gen. No. 8960 **Agenda No. 33**

MR. JUSTICE FULTON delivered the opinion of the Court.

This suit originated in a Justice of the Peace Court and by appeal was taken to the Circuit Court of Pike County. The case was heard by the Court without a jury and this appeal is taken from the judgment rendered by the Circuit Court.

The Appellant and the Appellee are the owners of adjoining farms situated about four miles south of Rockport in Pike County, Illinois. The farms were partly divided by a line fence on a section line and there had been considerable dispute and controversy between the parties concerning the division, building and maintenance of the line fence. On August 25th, 1934 the parties entered into an agreement in writing to arbitrate their various disputes in relation to the line fence. They appointed arbitrators, who visited the premises and made an award defining the sections of the fence that each party was to construct and maintain.

The controversy arises chiefly from one section of the line fence known as Section 3 on a plat attached to the award of the arbitrators. This particular part of the line fence was allotted to the Appellant by the arbitrators and she was given until September 15th, 1934 to tear down the old fence and build an entirely new fence on that part known as Section 3. The Appellant had growing corn on her side of the line fence designated as Section 3 and the Appellee had a barren pasture on his side of the same portion of said fence. The award by the arbitrators was dated August 29th, 1934 and as a part of the findings therein it was found that the whole of the line fence was generally in poor condition and would not turn stock. On September 4th, 1934 and for several days prior thereto the Appellee turned stock into his field or pasture adjoining the part of the fence known as Section 3 and the stock wandered through on to Appellants corn field through this section during the period of construction. On the said date Appellant held the stock of Appellee, found

upon her premises, and served notice in writing upon the Appellee on September 4th that she had taken and held his stock and demanded damages. The stock was kept by the Appellant, watered and fed by her, until the 17th day of September 1934. At that time Appellant demanded the sum of $25.00 from Appellee for damages incurred by reason of feeding and caring for the stock before she would return same to Appellee. On the same date Appellee instituted this suit for replevin by filing an affidavit and bond with a Justice of the Peace. A writ of replevin was issued by the Justice, served by the Constable on the following day and all of the stock mentioned in the replevin writ was returned to Appellee except one black sow and three shoats which the Constable was unable to find. No tender of any money was made by the Constable nor any amount by the Appellee to cover damages or for cost of feeding the property and caring for it at the time the replevin writ was served and the stock returned. A large amount of testimony was taken on the value of the feed and care furnished by the Appellant during the period from September 4th to September 17th.

The testimony disclosed that the stock crossed through the section of the line fence known as Section 3 which the Appellant, under the arbitration award, was obliged to maintain. She relies upon Par. 21 of Chap 54 of Smith-Hurd R. S. 1935 concerning "Fences" as a basis for her taking up and holding possession of Appellees stock found upon her premises, a portion of which paragraph reads as follows:

> "If any such animal or animals shall break into an inclosure surrounded by a fence of the height and sufficiently prescribed by this act, or shall be wrongfully upon the premises of another, the owner or occupier of such inclosure or premises may take into possession such animal or animals trespassing, and keep the same until damages, with reasonable charges for keeping and feeding, and all costs of suit be paid, to be recovered in any Court of competent jurisdiction."

It was therefore incumbent upon the Appellant to prove by a preponderance of the evidence that the stock of the Appellee was wrongfully upon the premises of Appellant. We believe that she totally failed to sustain this burden by competent proof. The Appellee turned his stock into his own pasture and it was permitted to cross the line on the section of the fence alotted to the Appellant and although she had been

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